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CHARLES ELMORE GROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

10 EAST 40TH STREET BUILDING, INC.,

Petitioner,

against

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ALFRED BREGLIA, JOSEPH BARBARA, GERALD KERR, PETER OHAN, ANGELO MICALLEF, FRANK VOSCINAR, WILLIAM DE TROY, JOHN MICHALICKA, ISADORE MIKA, JACOB VARTABEDIAN, LAURENCE ZAMMIT, JULIUS OROSZ, CHARLES BONNICI, BENJAMIN C. HARRIS, DENNIS SHEA, ALFONSO CHIVELLY, THOMAS CALLAHAN, FRANK LANGE, FRANK COLANGELO, SALVATORE FIORENZA, JOSEPH SPITERI, WALLY SPITERI, AZIZ KASSABIAN, ALBERT VOGEL, PAUL CHAMBERS, SAMUEL MITCHELL, PETER MACREDI, ELIA VECCHIONE, MICHAEL ADDEA, MICHAEL DE TROY, JOSEPH S. RAYZAK, HERBERT B. McCLELLAND, THOMAS ROSSO, GAETANO GRECK, JOHN L. ORTIZ, GILBERT ORTIZ, PASQUALE A. SAGGESE, EDWARD KILLIAN, JAMES H. LAW, GEORGE OROSZ, SALVADORE SANCHEZ, ROBERT MURDEN, JOHN P. SMYTH, FRED KASSAB, JOSEPH CEFALI, JOSEPH HERRERA, EMIL J. CISEK and CHARLES G. BORG, suing in behalf of themselves and all other employees and former employees of defendants similarly situated,

Respondents.

BRIEF FOR RESPONDENTS

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Respondents.

BRIEF FOR RESPONDENTS

Opinions Below.

This is an action by 51 building service employees of defendant 10 East 40th Street Building, Inc. for unpaid overtime compensation and liquidated damages under Section 16 (b) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, Pub. 718, 75th Cong. 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*). The opinion of the District Court for the Southern District of New York dismissing

the complaint after trial without a jury is reported in 51 F. Supp. 528. The opinion incorporates findings and conclusions (R. 312-321). The unanimous opinion of the United States Circuit Court of Appeals for the Second Circuit reversing the judgment of the trial court, is reported in 146 F. (2d) 438 (R. 339-343).

Statement of Jurisdiction.

The judgment of the United States District Court for the Southern District of New York dismissing the complaint upon the merits was rendered June 3, 1943 (R. 333). The decision of the United States Circuit Court of Appeals for the Second Circuit reversing the judgment below was handed down December 12, 1944 (R. 339). The Court modified the first two sentences in its opinion slightly on December 21, 1944 (R. 344). The Circuit Court issued and filed its order for a mandate to the District Court on December 27, 1944 (R. 344), and subsequently granted a 30-day stay for petitioner to make application for writ of certiorari. Certiorari was granted February 12, 1945 (R. 346).

Jurisdiction has been invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Pet. Br. p. 2).

Statutory Provisions Involved.

In Section 2 of the Act, Congress stated its findings and declaration of policy. Congress found in Section 2 (a) "that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers

of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce."

Section 2 (b) declares the policy of the Act to be "through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries."

Section 7 of the Act provides that no employer shall "employ any of his employees who is engaged in commerce or in the production of goods for commerce" for a work week longer than 44 hours during the first year of the Act unless such employee receives compensation for his employment in excess of such hours "at a rate not less than one and one-half times the regular rate at which he is employed." On October 24, 1938 the statutory work week was reduced to 42 hours, and since October 24, 1940 it has been 40 hours.

Section 3 (b) defines "commerce" to include "trade, commerce, transportation, transmission or communication among the several States or from any State to any place outside thereof."

Section 3 (j) defines "produced" as "produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Section 3 (i) defines "goods" to mean "goods

wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof

Section 16 (b), upon which this action is founded, provides that employees who have been employed in excess of the Act's standard hours without receiving the indicated additional compensation for overtime in accordance with Section 7 of the Act may sue to recover the unpaid overtime compensation, an additional equal amount as liquidated damages, a reasonable attorney's fee and costs of the action, in any court of competent jurisdiction.

Statement of the Case.

A. The Pleadings and Admissions.

The complaint alleged that during the period after the Act became effective space was leased by the defendant owner in its 40-odd story building to over 100 tenants, including a substantial number of manufacturing companies, manufacturers' sales agents, trade associations, distributors and exporters (R. 4-5); that the manufacturing companies and concerns were engaged at factories and plants in various states of the United States in producing for interstate commerce and distributing in interstate and foreign commerce substantial quantities of various goods (R. 5-6); that the offices of the manufacturing companies and sales agents of such companies occupying space in the building were tenanted by employees engaged in performing various functions and activities constituting a necessary and essential part of the manufacturing and production of such goods for interstate commerce, in placing orders and in executing contracts for the purchase of various raw materials and for the sale of various finished products for shipment in interstate commerce, in gathering advertising and publicity information and materials and distributing

such information and materials in interstate commerce, and similar activities (R. 6-7).

The complaint also averred that space in the building was leased to a substantial number of tenants who there engaged in the preparation of and other work upon magazines and publications, blueprints, plans, designs, drawings and specifications for use in engineering and industrial work, advertising and publicity materials, copy, lay-outs, photographs and displays, radio scripts, photographic prints, trade association reports, bulletins and statistical tables, printer's and lithographer's materials, purchase and sale orders, telegraph messages, shipping documents and other goods, substantial quantities of which were, subsequent to the work performed upon them in the building, distributed in interstate commerce to points in various states of the United States (R. 7-8).

These tenants and others admittedly made regular and continuous use of the mails, telephone and telegraph in preparing and disseminating messages between their offices in the building and various points outside the State of New York (R. 9; 309).

The complaint further stated that the various plaintiffs were employed during the period subsequent to October 24, 1938, when the Act went into effect, as elevator operators, watchmen, porters, mechanics and handymen and in similar capacities, in performing the usual and customary duties of persons charged with effective maintenance and operation of such a building (R. 9), and that in performing their duties the employees were engaged in interstate commerce and in the production of goods for interstate commerce within the meaning of the Act (R. 9-10). Finally, the complaint alleged that the various employees were employed, during the period subsequent to October 24, 1938, for hours in excess of the maximum standard prevailing under Section 1 of the Act, and the defendant failed and

refused to compensate them for the excess hours at rates not less than one and one-half times the regular rates at which they were employed, contrary to the Act's overtime provisions (R. 10).

The answer admitted that defendant's employees at all times performed the customary duties of persons charged with effective maintenance and operation of such buildings, including various enumerated activities (R. 12). It was not disputed that the employees were employed for hours in excess of the Act's standards without receiving time and one-half for overtime (R. 12). Finally, the answer made certain concessions regarding the general character of the tenancy of the building, including the fact that 27% of the space was leased to 20 manufacturing companies "for executive and sales offices", and 10% to 7 advertising and photographic studio concerns (R. 13). The parties agreed by stipulation upon the amount which each plaintiff must recover if entitled as a matter of law to succeed as an employee "engaged in commerce or production for commerce" (R. 308, 310-312). Certain other material facts, also stipulated prior to trial, are best considered together with the evidence, of which they constitute a part (Pl. Ex. 1, R. 307-309).

Upon the trial plaintiffs examined some 55 witnesses, all tenants in the building, with a view to developing the facts with respect to the area of the occupancy and the character of the business of each tenant (R. 312). Defendant called no witnesses but rested upon its motion to dismiss on the law (R. 306).

B. Summary of the Facts.

1. Nature of Defendant's Business.

During the period covered by the complaint defendant was the owner of the 48-story and basement 10 East

40th Street building in New York City and defendant's business consisted of the management and operation of the building and rental of space in the building to various tenants. (findings 2-3, R. 313). In connection with the operation of the building defendant employed plaintiffs as maintenance employees (finding 4, R. 313). These employees furnished and maintained various services and facilities for the use and benefit of all of the tenants in the building, including heat and hot water, elevator service, fire sprinkler protection and electric lighting, and performed various other duties essential to the maintenance of clean, safe and habitable working quarters. (Pl. Ex. 1, R. 308-309).

2. Activities of the Various Tenants.

The gross area available for rental in the 10 East 40th Street building was 234,425 square feet (finding 5, R. 313). Space was rented to 111 tenants, occupying 89% of the gross rentable area, the remaining 11% of the space being vacant (findings 5-6, R. 313).

Included among the tenants at all times were the following (finding 6, R. 313-314):

(1) Executive and sales offices of 20 manufacturing and mining companies occupying 25.8% of the gross rentable area or 29.0% of the occupied space in the building.

(2) Offices of sales agents for 17 manufacturing and mining concerns occupying 9.3% of the gross rentable area or 10.4% of the occupied space in the building.

(3) Offices of 5 export and import concerns occupying 3.7% of the gross rentable area or 4.2% of the occupied space in the building.

(4) Offices of 10 advertising agents, publicity firms and trade organizations occupying 6.6% of the

gross rentable area or 7.4% of the occupied space in the building.

(5) Offices of 7 engineering and construction firms, occupying 8.9% of the gross rentable area or 9.9% of the occupied space in the building.

(6) Offices of 5 tenants engaged in investment, finance, credit and similar businesses occupying 4.1% of the gross rentable area or 4.7% of the occupied space in the building.

(7) An office of the United States Employment Service, an agency of the United States Government affiliated with the War Manpower Commission, occupying 13.6% of the gross rentable area or 15.3% of the occupied space in the building."

Plaintiffs do not seek to predicate their right to recover upon the activities of two additional classes of tenancies:

(a) Offices of 24 lawyers or law firms, occupying 13.6% of the gross rentable area or 15.3% of the occupied space in the building.

(b) Offices of 22 tenants engaged in miscellaneous businesses not interstate in character, occupying 3.3% of the gross rentable area or 3.8% of the occupied space in the building.

The trial court found that the services rendered and the work done in the defendant's office building by the officers, agents and employees of the tenants encompassed the following (finding 7, R. 314-315):

(1) Manufacturing and mining companies use their offices for executive and administrative activities, for conferences, and for taking orders for sub-

* The finding referred to percentages of "rented area" (R. 313). The parties have stipulated to correct this to indicate that the percentages are of "rentable area" (R. 334). Adjustment to show percentages of occupied space is mathematical, based on the 11% average of vacancies (finding 5, R. 313). The Circuit Court accepted the correction and stated occupancy in terms of both rented and rentable area (R. 342-343).

stantial quantities of merchandise of substantial value produced and shipped from their factories and mines elsewhere located to customers in various states. Seven of these companies also carry on advertising or publicity work in their offices.

(2) Sales agencies of manufacturing and mining concerns use the offices in the building to sell a variety of the products of the companies they represent. Orders are taken and are forwarded by mail, telephone, teletype or other means of communication to factories and mines located in various states for shipment of goods to various parts of the country. As a result of the efforts of these agencies, substantial amounts of merchandise of substantial value are shipped across state lines from factories, mines and warehouses.

(3) The United States Employment Service places white collar workers in various factories and business houses. Practically all the registrants served by this agency are located in the State of New York, and about 96% of the placements are within the State of New York, about 2% resulting from referrals from out-of-state branches of the U. S. E. S. in other cities through a nationwide job clearance system.

(4) The advertising agents carry on publicity and advertising work using national publications, newspapers and radio. One publishing firm receives stories for fiction magazines which are sold all over the country. These magazines are printed off the premises and are delivered by the printers to an outside firm which distributes them. The work in the building includes the purchase and receipt of scripts, the examination and correction of such scripts and the regular business and financial activities of the firm. The officers and employees of the trade organizations are principally engaged in research and correspondence incidental to their operations. They also prepare circulars and in some cases weekly or monthly publications which are elsewhere

printed and are in most cases distributed from places other than the building; some are distributed directly from the building.

(5) Engineering and construction firms carry on their correspondence and executive and administrative activities, including financing, collection work and estimating on and submission of bids. In some cases the officers, agents and employees of these tenants prepare plans and sketches in the building for construction projects located in various parts of the United States and in foreign countries.

(6) Investment, financing and credit organizations use their offices in the building herein for their executive and administrative work, conferences, correspondence, keeping of records, arranging for loans, and reports. The investments, financing and credit work is done in connection with businesses and projects located in various parts of the country.

(7) Import and export concerns make arrangements for export and import of a variety of goods of substantial value. The goods are stored at and shipped from places other than the building.

Since "interstate commerce is not a technical legal conception but a practical one, drawn from the course of business" [HOLMES, J. in *Swift & Co. v. United States*, 196 U. S. 375, 395] and "the true perspective is to be drawn from the whole picture" [*United States v. General Motors Corp.*, 121 F. (2d) 376 (C. C. A. 7), cert. den. 314 U. S. 618], determination of whether the Fair Labor Standards Act applies to these plaintiffs depends upon full consideration of the activities of the tenants in the building to which their services related. The character of the work performed at 10 East 40th Street by a number of the principal tenants as indicated by the testimony is therefore set forth here in some detail.

Manufacturing and Mining Companies

Forbes Lithograph Manufacturing Company, occupying space on two different floors, produces lithographed materials and rotogravure printed materials in its plant at Chelsea, Mass. (R. 18-19, 40). Two of the six sales offices of this company covering the United States are located in the building (R. 19, 46). The selling area of one includes New York, New Jersey and Connecticut and that of the other extends exclusively to customers outside of the State of New York (R. 24, 40). Orders are solicited from out-of-state customers by mail, telephone and direct customer contact from the offices in the building (R. 24, 40), and forwarded to the Chelsea plant together with make-up and shipping instructions (R. 41, 50). Customers include Coca Cola, DuPont, Hercules Powder and Saturday Evening Post (R. 24, 28). The total annual volume of sales attributable to the efforts of one of these offices alone is approximately \$2,000,000 per year and an additional substantial amount is accounted for by the other office (R. 51, 52, 54); this represents nearly one-half of a total annual nationwide business of the company approaching \$5,000,000 (R. 54). All of this volume represents materials produced to order (R. 40) including posters, window and counter displays, booklets, folders, wrappers, cartons, labels, calendars and other advertising and packaging materials involving lithographing or rotogravure printing work (R. 31, 35, 41, 45, 46, Pl. Ex. 3).

One of the offices of *Forbes Lithograph* is in charge of a sales manager and director of the company (R. 22). It houses the chief artist of the company who characterizes himself as the "creator of the art work" (R. 20-22) incorporated in the finished printed and lithographed materials turned out at Chelsea, Mass. (R. 24-26). He supervises some seven or eight artists on the payroll at the Chelsea plant and several others employed in one of the offices

maintained by the company in the building (R. 20, 42). His work includes assisting and advising customers and prospective customers with respect to preparation of art work and accompanying legends ultimately incorporated into the company's finished products (R. 21, 23-26, 35-36). When a customer such as the Coca Cola Company requires a lithographed advertising device, for example, a fountain festoon, it is up to the chief artist "to create a piece of art work that will carry the message," to "develop the idea" (R. 24-25). The chief artist deals constantly with freelance artists who call at his office in the building in connection with projects upon which they are working involving orders or accounts of *Forbes Lithograph* customers (R. 21-23). He drafts sketches for their guidance to indicate the manner of carrying out his creative ideas (R. 22, 27-28). Similarly, from time to time, as orders or projects require, he calls for the services of and consults with freelance copy writers (R. 21, 36-37). He freely criticizes the work of the artists and writers; occasionally the artists may retouch their work while in the office at 10 East 40th Street to conform to his suggestions or corrections (R. 28, 35). From time to time likewise he assists with the wording of the legend to be incorporated in the finished printed or lithographed material turned out by the Chelsea plant (R. 23, 35-37).

The other office of *Forbes Lithograph Manufacturing Company* in the building is headed by a vice-president and director of the company in charge of sales and in charge of one of its manufacturing divisions (R. 39, 52). Naturally, he consults from time to time with the chief artist, in connection with art work for various current orders and related matters (R. 47). His staff includes several artists engaged in the building in performing original art work, including the conception of ideas, depiction of designs, lettering of legends, setting up of original dis-

plays and other work upon master materials before they are sent to Chelsea, Mass. for reproduction (R. 42-43, 54). These artists "are kept busy the entire year" in the work of creating and translating into the art medium the ideas which culminate in *Forbes Lithograph* products distributed to customers throughout the United States (R. 40-41, 43, 55). Art designs not entirely created in the office in the building but originated elsewhere may also be touched up by these artists prior to lithographing (R. 60). Paintings and lay-outs ready for reproduction are inspected, varnished, wrapped and shipped from the 10 East 40th Street building to Chelsea, Mass. (R. 38). Lay-out instructions and similar details necessary to the ultimate manufacture of the particular piece are prepared in the building and transmitted to Chelsea (R. 38). Sample proofs are sent from Chelsea to 10 East 40th Street, examined and marked for correction there, and returned to Chelsea by mail or express, preparatory to turning out the finished product (R. 30-31). The work varies in size from small creations capable of clipping to the back of an order, in which case proofs are placed in manila wrappers, to conceptions of a large size requiring crating for shipment from the building (R. 31, 41). The chief artist "demands to see proofs" of anything he creates; from time to time he also returns proofs to customers with corrections suggested or requested (R. 30-31). If draft art-work requires correction he may make the change himself (R. 35).

Long distance telephone and a teletype connection are in regular daily use "to get and give information"; to check upon the progress of goods in process at the Chelsea plant; to discuss with the plant personnel changes in outline, size, color or shading; to confer and advise with respect to speeding deliveries in the interest of prompt and efficient customer service; to advise the plant that art work, lay-outs or proofs are en route and that certain

make-ready preparations should be begun in connection with the production of particular orders (R. 50-52). The nature of the lithograph process is such that the art work performed at 10 East 40th Street is identically reproduced, through the photographic medium "as near as can be physically done" in each item of finished product turned out in the plant at Chelsea, Mass. (R. 38, 46, Pl. Ex. 3). Work done in connection with the Coca Cola account alone would thus be reproduced in more than 100,000 pieces of material yearly (R. 33). Gum wrappers designed in the building (R. 55) and distributed to customers directly from Chelsea probably exceed 200,000,000 per year.* All of these items are distributed through various states (R. 43, 53).

Integration of the art and sales work at 10 East 40th Street with the plant turning out the finished product in Chelsea involves continuous communication by telephone, teletype and mail (R. 49-52). In this connection, the vice-president in charge of the New York divisional office also frequently travels back and forth to advise and assist both with respect to plant production problems and with regard to sales problems arising in his territory (R. 52-53). He was originally a production man and endeavors to control from his New York office the operation of an important production department in the Massachusetts plant supplying goods to customers all over the country (R. 52-53).

Eastman Kodak Company occupies space on two floors for the use of photographers and copy writers in furtherance of advertising and publicity campaigns involving the products of the company and its various subsidiaries (R. 69) and the uses to which those products may be put by other manufacturers (R. 75-76). In one suite there is the

* Average gross yearly sale of gum wrappers by the New York divisional office of Forbes Lithograph Manufacturing Company is 250,000 pounds (R. 45); there is a minimum average of 800 wrappers to the pound (R. 45); 800 x 250,000 equals 200,000,000.

usual paraphernalia of photographic studios; including lighting equipment, numerous commercial cameras, developing rooms, with the necessary chemicals, all admittedly utilized to "produce photographs" (R. 70-71). The sets for the photographs are staged, the pictures are taken, the films are developed and the prints are made in the 10 East 40th Street building (R. 70-71). Between 100 and 200 prints are turned out weekly (R. 71). Finished prints are delivered from the photographic studios to the publicity office on a different floor; from time to time the photographers go back and forth between floors to confer with the copy writers (R. 70-71).

A staff of eight copy writers prepares stories and captions to be coordinated with photographs produced in the studios and sends out releases, prints and other publicity materials to newspapers and magazines all over the country by mail (R. 74-78). Most of the releases incorporate photographs taken in the studios in the building and all of the accompanying copy is written in the building (R. 77). During a typical period covering several months early in 1941, 16 photographs and captions prepared at 10 East 40th Street by *Eastman Kodak*'s staff, were published in various issues of newspapers throughout the United States having a combined circulation in excess of 20,000,000 (R. 81-82, Pl. Ex. 10). One photograph reproduced in about six newspapers, for example, reached about 1,200,000 readers in various states (R. 81, Pl. Ex. 10). These examples represent but a small part of all of the pictures and publicity copy produced in the building which enter into newspaper circulation all over the United States, the majority of it outside the State of New York (R. 81-82).

Beechnut Packing Company which manufactures food products and confections for interstate commerce at three plants in the State of New York rents space for advertising

and executive offices (R. 96, 97, 99). An advertising manager who makes his headquarters at 10 East 40th Street determines general policy of the company with respect to all of its advertising and originates campaigns to popularize the various products of the company (R. 97). He considers his job "creative"; while the actual copy is written by outside advertising agencies, it is based upon his ideas (R. 97). All of the *Beechnut Packing* copy involving programs formulated upon a nationwide basis with the use of a variety of advertising media must be approved by the advertising manager at 10 East 40th Street (R. 98). Representatives of the agencies with which he deals call at his office to submit material; he confers with and advises them constantly; in connection with his supervision of the company's advertising programs, from time to time he corrects or changes the copy submitted (R. 99). The advertising matter which he originates, or which he supervises in preparation, goes to newspapers and publications throughout the United States in very substantial quantities (R. 102). Beechnut sales approximate \$36,000,000 a year.*

10 East 40th Street also contains the executive office of the president of the *Beechnut Packing Company*, who is in constant communication with the main office at Canajoharie, by direct wire with relation to company problems (R. 99). A teletype machine is also maintained in the building to facilitate regular communication with the plant (R. 102). One of the company's divisional sales managers is likewise housed there (R. 99).

Perolin Company of New York, manufacturing chemists with a plant in Chicago, where products are produced for delivery all over the United States, has a sales and advertising office in the building covering a number of states in New England and along the Atlantic coast (R. 209, 212). Products are sold from stock at Chicago or from stock in a warehouse in Brooklyn (R. 209-210). The annual volume

* Moody's *Industrials* (1944), quoting 1943 figures.

of sales is approximately \$125,000 (R. 210). Orders and shipping instructions are prepared and regularly forwarded to Chicago from 10 East 40th Street; there is constant communication by mail, telephone and telegraph with the plant (R. 210). The duties of the office staff in the building include preparation of sales estimates to enable the factory to anticipate and maintain a level of production sufficient to insure a stock which will supply accumulating orders (R. 210-211). Copy is also prepared at 10 East 40th Street for circulars and bulletins publicizing the company's products which are sent out from the building to customers in various states to the extent of some 40,000 pieces per year (R. 211, 213).

Cleveland Diesel Engine Division of the General Motors Company maintains a sales office in the 10 East 40th Street building and stores there a stock of spare parts for Diesel engines (R. 61). Parts ordered and received from the factory in Cleveland, Ohio, have been stored, sold and shipped directly from the building, 50% of the deliveries being to customers in other states (R. 61-63). Service engineers, whose headquarters are at 10 East 40th Street, are also engaged in adjusting and "trouble shooting" in connection with Diesel engines in operation (R. 63). Sales of such engines to customers, both within and without the State of New York, by the staff in the building, are substantial in amount (R. 306-307).

Tennessee Eastman Corporation, a subsidiary of the *Eastman Kodak Company* (R. 72, 75, 79), manufactures chemicals and plastic products at Kingsport, Tenn. (R. 63) and maintains in the building a sales office covering the States of Connecticut, New Jersey and Pennsylvania, as well as New York (R. 64). There is constant communication by mail, telephone and teletype with the Kingsport, Tenn. plant, to which orders taken in New York are forwarded (R. 64, 66). Sales are by telephone and mail and

also upon personal visit of purchasers to the 10 East 40th Street office (R. 66). Merchandise is all made to order at the Tennessee plant (R. 66). Sales for delivery from Kingsport to customers in various states approximate \$1,000,000 per year (R. 68).

The building also houses the *Ediphone Division* of the *Thomas A. Edison Co. Inc.*, which has a factory at West Orange, New Jersey, from which Ediphone machines are ordered and delivered by the company's truck for sale in the metropolitan area (R. 112-113). Requisitions for machines are prepared and forwarded from the building to the West Orange factory which fills them to the extent of about 250 machines monthly and "hundreds of thousands" of spare parts are also ordered and received from New Jersey (R. 113). The sale value of machines ordered from the company's New Jersey plant is about \$645,000 per year, to which must be added about \$15,000 worth of parts annually (R. 114). From time to time upon customer's request Ediphone machines are brought to 10 East 40th Street, where they are specially packed for shipment to an office of the customer in another part of the United States (R. 114). Machines examined or received for repair on the premises are occasionally returned to the West Orange, N. J., factory for scrapping (R. 112, 115). There is regular and continuous communication with West Orange by three or four direct wire telephone connections; and a messenger goes back and forth daily between the factory and the New York office (R. 115). The company's own delivery truck delivers requisitioned Ediphones and parts directly to the premises in the 10 East 40th Street building, bringing them up in the building elevator three times weekly (R. 115-116).

In addition, the *Export Division* of *Thomas A. Edison Co. Inc.* sells through its 10 East 40th Street office between

* 250 machines a month (R. 113), \$215 average sale value per machine (R. 114); $250 \times 12 \times \$215$ equals \$645,000.

\$500,000 and \$1,000,000 worth of Edison products per year for export, including such goods as batteries, spark plugs and Ediphone equipment (R. 124, 127). All goods sold involve special manufacture pursuant to the order taken for export (R. 125, 127). The *Thomas-A. Edison Co.* export office at 10 East 40th Street prepares orders and forwards them to the factory at West Orange, N. J.; makes traffic arrangements with steamship and railroad companies; prepares shipping documents and bills of lading in connection with all shipments; arranges delivery of goods to steamship docks by Edison truck from the West Orange, N. J. plant; consults daily with the production staff at West Orange (R. 125-127). The Export Division has a branch office in London and maintains regular and constant communication with this branch and with its distributor outlets all over the world by mail, cable and frequent travel (R. 126-127). There are two direct wire telephone connections between the 10 East 40th Street office and the West Orange plant (R. 126).

Cherokee Spinning Company of Knoxville, Tenn., has an office in the building where over \$1,000,000 of cotton goods are sold annually for delivery across state lines from Knoxville to customers, a substantial number of which are outside of the States of New York and Tennessee (R. 138-142). Goods sold "have to be made up specifically to the order" (R. 143). There is no other sales office of the company (R. 140). Work performed at 10 East 40th Street by *Cherokee Spinning Company* employees also includes the designing by "stylists" or designers of handkerchiefs and handkerchief borders or strips in full color (R. 142-143, 149); handkerchiefs are made up at the Knoxville, Tenn., mill based upon designs executed at and forwarded from the office in the building (R. 144, 151). Sometimes designs are made up pursuant to orders received and on other occasions sample designs are exhibited to customers

and orders are taken for goods to be made up at the Tennessee plant from designs selected by the customer from the samples (R. 144-145). Execution of orders at Knoxville pursuant to designs made up at 10 E. 40th Street is a frequent occurrence (R. 151). Installed in the office of this company is a teletype machine used from time to time to transmit instructions with respect to execution of textile designs to the out-of-state mill and to answer inquiries from the mill regarding the carrying out of the designs (R. 145-146). Complete instructions for mill make-up are incorporated in the original design sheet as prepared at 10 E. 40th Street and transmitted to the mill (R. 146, Pl. Ex. 22); the specifications prepared for mill use include, in addition to the pattern, indication of type of yarns to be employed, weaving directions, color combinations to be utilized and the general warp and weft arrangement (Pl. Ex. 22).

Another tenant, *J. H. Dunning Corp.*, is a manufacturer of wooden boxes and box shooks and also markets sawdust and other by-products of considerable value (R. 161-162). The company has plants in N. Windham, Me., Biddeford, Me., Decatur, Ala., Richmond, Va., and San Francisco, Cal.; deliveries are made from all of these plants, pursuant to orders forwarded from 10 East 40th Street, to customers all over the United States (R. 162). Gross sales between November 1, 1938 and June 1, 1942 were about \$1,500,000, or slightly less than \$500,000 per year (R. 163). The various plants of *J. H. Dunning Corp.* in four states are "in constant contact" with the president, who maintains his office in the building in New York City; in carrying out production policies "they do not blow a whistle without his approval or sanction" (R. 163). He indicates the orders to be worked on, the general scheme of plant operations and similar matters related to production (R. 164). Continuous communication is maintained by teletype from

the office at 10 East 40th Street directly to the various plants outside the State of New York; in the *Dunning* enterprise "everybody takes his orders from 10 East 40th Street" (R. 164).

Vanity Fair Mills, Inc. occupies an entire floor in the building (R. 165). The company manufactures women's hosiery and underwear at plants in Reading, Pa., Monroeville, Ala., Jackson, Ala., and New Holland, Pa. (R. 165). Sales are made by telephone and personal contact with customers calling at 10 East 40th Street, and orders transmitted to the plants of the company result in interstate shipments to purchasers throughout the United States (R. 166-167). Sales are by sample; sometimes orders are filled from stock maintained at one of the plants, and sometimes the goods must be made up after the order has been placed (R. 166). *Vanity Fair* also has at 10 East 40th Street the offices of its advertising manager, who confers there with representatives of outside advertising agencies and who places the company's advertising upon a nationwide scale in such consultations (R. 167). Outside agencies submit sketches, designs and lay-outs to the advertising manager, who from time to time makes corrections or suggestions with regard to such lay-outs (R. 168). Occasionally executives from the company's plants visit the sales office in the building, where they make their headquarters while in New York City for such activities as conferences and arranging the purchase of materials for delivery to the company's plants in various states (R. 169-170). A forecast of sales is formulated as part of the function of the sales department at 10 East 40th Street; goods are produced at the factories in coordination with anticipated requirements indicated by the plotting of accumulating orders (R. 170).

Space rented to the *S. S. White Dental Manufacturing Company's Industrial Division* houses sales engineers en-

gaged in marketing and taking orders for flexible shafting for use in engines and similar engine devices (R. 175-176). The devices are produced at a plant in Staten Island, N. Y., but the sales area covered by the 10 East 40th Street office includes the entire United States (R. 176-177). The gross value of sales in the building between November 1, 1938 and June 1, 1942 was \$3,500,000, or an average volume of about \$1,000,000 per year (R. 177, 179); about 75% of sales are for delivery to customers outside the State of New York (R. 180). All goods are produced to order from designs as received at the factory; the flexible shafting is not carried in stock (R. 179). The sales engineers who take the orders at 10 East 40th Street make up a design and accompanying instructions appropriate to the customers' desired use of flexible shafting; the design contains accurate specifications followed by the factory in producing the shafting to fill the order (R. 177, 179). Goods made up at the plant from these designs are shipped all over the United States (R. 177). Communication by teletype is maintained directly with the plant; from time to time an engineer at the plant may be called upon to assist sales engineers at 10 East 40th Street in preparing designs pursuant to which shafting is to be produced (R. 177).

Arkell Safety Bag Co. produces bags, used as linings for boxes, containers and cartons for packaging various products, in plants in Brooklyn, N. Y., and Chicago, Ill. (R. 183). The company's executive offices and a sales office covering the entire eastern part of the United States are located at 10 East 40th Street (R. 183). Orders are taken and forwarded to the plants for delivery across state lines in very substantial quantities (R. 183, 187). Sales through the 10 East 40th Street office exceed \$500,000 annually (R. 187). A traffic department in the 10 East 40th Street office arranges the routing of shipments from the Brooklyn plant to fill interstate orders (R. 187). Orders taken by *Arkell*

Safety Bag Co. salesmen on the road are mailed to the 10 East 40th Street office, where executives determine whether the orders are to be filled by production at the Brooklyn plant or the Chicago plant (R. 184). About 95% of the entire production of the company is made to order to meet customer's specifications (R. 188). The president and vice-president of the company have offices at 10 East 40th Street, where general management policies in connection with the company's affairs are determined; finances are arranged in connection with the production and distribution of goods for both plants (R. 185-187); contracts are negotiated in connection with the production and distribution across state lines to the Brooklyn and Chicago plants and equipment for the factories is similarly purchased and insurance placed (R. 188-189). Direct mail advertising to customers and prospective customers all over the United States is also handled from the office in the building; circulars are made up in connection with this work using a mimeograph machine there (R. 188). A teletype connection is used to communicate messages to the Chicago plant, to expedite deliveries (R. 184).

Chase Brass & Copper Co. occupies four floors as headquarters for the sale of brass and copper lighting and plumbing fixtures, containers and closures and other items manufactured at its Waterbury, Conn. plant (R. 196). The territory covered by the 10 East 40th Street sales office includes the entire United States (R. 198); average annual volume of sales orders placed there, all filled subsequently from the Waterbury, Conn. plant, is close to \$1,000,000 (R. 197). All these products "when manufactured are then shipped to customers outside of the state where they are manufactured" (R. 196).

Cluett Peabody & Company, the well-known men's apparel manufacturer, rents one entire floor in the building and a substantial portion of another (R. 234). The com-

pany produces neckwear, underwear, collars, handkerchiefs and shirts at plants in Troy, N. Y., Corinth, N. Y., Leominster, Mass., Waterford, N. Y., and Atlanta, Ga. (R. 234). Both merchandising and advertising departments, a designing staff and a sales department of a neckwear selling subsidiary, center at 10 East 40th Street (R. 235-236). The merchandising department purchases the raw materials used in the production of the various lines at the company's five plants, involving a total annual business of approximately \$35,000,000 per year (R. 235, 239). These extensive purchases are for shipment from Southern or New England cotton mills directly to the *Cluett Peabody* plants in various states (R. 235). A designing staff at the office in the building sketches and originates patterns to be made up at the *Cluett Peabody* mills; executives at 10 East 40th Street decide what patterns are to be utilized; weaving instructions are prepared and transmitted to the mill with each selected design (R. 235, Pl. Ex. 25). Specifications in the instruction sheet accompanying the designs, as prepared at 10 East 40th Street, include width of cloth, total yardage, pattern, with color layout, and warp arrangement, including number, type and color of yarns, number of threads to be woven and similar data; cloth made up at the *Cluett Peabody* plants conforms exactly to such designs and instructions (R. 235-236; Pl. Ex. 25).

A *Cluett Peabody* subsidiary with a showroom in the building is charged with the sale of neckwear (R. 236). Orders are taken by salesmen on the road, transmitted to the office at 10 East 40th Street and from there forwarded to the factory at Troy; buyers call to see the line; orders are received by telephone, telegraph and mail from customers throughout the United States (R. 236-237). There is continuous communication between the building and the various salesmen on the road all over the country, relating to their sales efforts (R. 237). Sales of neckwear made

through the 10 East 40th Street office, pursuant to which substantial quantities of merchandise are shipped in interstate commerce, approximate \$1,000,000 per year (R. 238).

From his executive office at 10 East 40th Street the president of *Cluett Peabody & Company* "guides the destiny of the company" (R. 238). The vice-president in charge of production at all the plants is in regular communication by telephone with the New York City office and makes weekly trips to 10 East 40th Street to confer there on production matters with the president (R. 238, 243). The president works similarly at 10 East 40th Street with other officials in charge of merchandising, market research, advertising and other departments of the company who are stationed there and is generally engaged in "setting up the policies of the company" (R. 238). The building also houses the staffs of an advertising department, display department, and a publicity department of *Cluett Peabody*, as well as the vice-president in charge of all of these activities (R. 239-242). The advertising department at 10 East 40th Street guides the work of outside agencies preparing advertisements for magazines; prepares brochures and pamphlets for publicity purposes; gets up market research reports for the aid of the sales department; writes advertising copy for college newspapers (R. 239-240, 241, 243). Press releases written in the building are sent to newspapers all over the country (R. 241). Outside artists call to confer relative to art material in process with the advertising manager, and from time to time corrections are made in proposed lay-outs on the premises before the work is approved (R. 240). Proofs are also received from the printer or lithographer, corrected in the building and returned ready for publication (R. 240). A display department originates and creates displays and booklets distributed by *Cluett Peabody* to outlets for its products all over the United States (R. 240, 244); the

volume of material of this nature sent out to customers in various states from 10 East 40th Street might approach 30,000 to 50,000 pieces per year (R. 240-241).

Three smaller companies occupying space in the building for sales and executive and administrative offices, include a producer of cotton bags with a plant in Cleveland, Ohio (R. 228); a manufacturer of fine silverware at Attleboro, Massachusetts (R. 193), and a firm producing food flavors and extracts in a New York City plant (R. 154-155). These three concerns take orders from customers all over the United States by mail, telephone and salesman contact, for delivery across state lines (R. 193-194, 229, 156). The aggregate sales accredited to their 10 East 40th Street offices are about \$200,000 per year (R. 154-155, 194, 228). Continuous communication is maintained between the offices of these tenants and their respective plants by mail and telephone. Long-distance telephone and a teletype are frequently used by one company to maintain communication with various Southern cotton mills in effecting purchase of raw materials for shipment to its Cleveland plant, valued at about \$140,000 per year (R. 228-229). The food concentrate concern houses at 10 East 40th Street the person in charge of its plant production, who carries on by telephone from the building the work of "instructions to the factory with relationship to production", including such matters as shipping instructions (R. 156-157).

Space in the building is also leased to a mining company, United Feldspar Minerals Corp., which produces feldspar, mica, flint, quartz and other minerals for shipment to customers in various states from its mines in North Carolina and Maine (R. 248-250), and maintains regular communication by use of the mail, telephone and telegraph with its customers as well as with the mines outside the state, from 10 East 40th Street, including cor-

* Ames Bag Machine Co.; Blackinton & Co.; Domestic Concentrates, Inc.

respondence with respect to "everything in connection with the operation of the plants" (R. 249, 251). The president and executive vice-president are housed there; they "run the corporation" (R. 248-249). There is some selling performed (R. 250). The executives decide what priorities to follow in working on orders at the plants (R. 250).

Finally, the greater part of a floor in the building is leased and occupied by *Standard Magazines, Inc.*, publisher of some 60 different magazines (R. 285, Pl. Ex. 27). At 10 East 40th Street is the company's main office where a numerous editorial staff interviews authors and artists, purchases stories and art work, reads articles and material submitted, performs editorial revision and prepares layouts of the copy, examines galley proofs and corrects and returns proofs to the printer ready for the press run (R. 286-289). The executives of the company allocate the work to four printing plants in New York, New Jersey, Illinois and Connecticut (R. 286). Between 32,000,000 and 35,000,000 copies of its magazines are distributed each year to news stands throughout the country; of which approximately 25,000,000 copies are sold annually (R. 287-288). The value of the product edited and prepared at 10 East 40th Street is at least \$2,500,000 annually.* Paper for the printing of the 60 *Standard Magazines* publications is purchased pursuant to orders or requisitions placed by mail and telephone from the 10 East 40th Street office. Pursuant to these orders shipments are made from paper mills outside the State of New York to the printing plants in New Jersey, Connecticut, Illinois and New York (R. 287-289). Business, sales and executive departments also function at 10 East 40th Street (R. 286, 289).

* Most of the magazines in the Standard Magazines group retail at ten cents per copy (Pl. Ex. 27).

Advertising, Publicity and Trade Publication Organizations.

Offices at 10 East 40th Street are also occupied by one of the country's largest publicity organizations and by a number of smaller advertising representatives and trade organizations. Together with these must be considered the advertising, publicity and editorial work carried on in the building by Forbes Lithograph Manufacturing Company, Eastman Kodak Company, Standard Magazines, Inc., Cluett Peabody & Company and other tenants whose activities have already been outlined above.*

Carl Byoir & Associates, and the affiliated *Business Organizations, Inc.*, occupy one entire floor and portions of two others (R. 83, 303). The firm represents, as public relations counsel, such manufacturers as Aluminum Company of America, Libby-Owens Company, Pullman Company, Willys-Overland, Marshall Field & Co. (R. 85, 90-91). The affiliated organization handles the Atlantic & Pacific Tea Company account exclusively (95). The office at 10 East 40th Street is the hub of the firm's operations; there are substantial branch offices in Washington, D. C. and Chicago, Ill. and local offices in Toledo, Ohio, Detroit, Mich., and Los Angeles, Cal. (R. 90). The office at 10 East 40th Street is the central point for mail or telephone clearance of all publicity material originating at the other offices, prior to release; the work of the entire organization is "all controlled and centered in New York" (R. 90). In connection with the operation of *Carl Byoir & Associates* there is regular and continuous correspondence and telegraphic and telephonic communication between 10 East 40th Street and the branch offices, representatives in the field and clients in various states (R. 90-91). Officials of the publicity firm travel back and forth across state lines frequently to visit headquarters of clients and their own branch offices; and personnel from the other offices fre-

* See references, pages 11-17, 21, 23, 25, 27 above.

quently visits the office in the building on business (R. 91). The 10 East 40th Street office is the "controlling organization" for the entire enterprise (R. 91).

The *Carl Byoir* offices employ over twenty "feature writers" and copy writers to prepare publicity material, radio scripts, magazine articles and advertising displays and exhibits of various sorts (R. 89, 91, 94). Releases prepared by this staff total 15,000 to 20,000 sheets weekly, all run off by mimeograph at 10 East 40th Street and subsequently sent out to newspapers and publications throughout the United States (R. 84-85, 92-93); 90% of the material is sent to addressees or consignees outside of the State of New York (R. 85). Copy prepared at 10 East 40th Street appears "verbatim" in newspapers throughout the country with a vast combined circulation; the total number of newspapers on the mailing lists of the organization is close to 17,000; the number of these papers to which any single release may be sent varies, of course, with the nature, purpose and content of the release (R. 92). *Carl Byoir's* mail department alone includes seven persons, engaged in operating the mimeograph machines, collating, stapling and folding releases, operating wrapping, sealing, stamping and addressing machines, and transporting the releases to the post office (R. 84-85). The average number of pieces of mail handled per week by this department is between 2,500 and 3,000 (R. 84-86). Occasionally, releases to be sent to 1,000 or more newspapers are, after being mimeographed by the mailing staff, bundled together to be sent, with accompanying mailing lists, to an outside mailing house for addressing and stamping (R. 84).

Carl Byoir & Associates' activities also include the work of a photographic department, which has a studio in the building, including all equipment and paraphernalia "necessary to photograph and develop" such as commer-

cial cameras, Kleig lights, developing rooms, and similar facilities (R. 93). An average of 200 prints a week produced and developed on the premises are sent out to newspapers all over the United States (R. 93). Frequently packages of pictures and releases are sent to the firm's branch offices in Chicago and Washington by mail or express for distribution through those offices; bulk shipments to the Chicago office are a weekly occurrence; packages are sometimes of such large size that they cannot be carried by hand to the post office and must be called for by the express company (R. 86). A single mail shipment may run to 500 separate pieces and occasionally, entire sacks of mail are taken directly to the post office from the building (R. 86). All of this material goes out of 10 East 40th Street constantly via the building elevators (R. 94) and much of it subsequently appears in hundreds of newspapers and publications throughout the length and breadth of United States, from metropolitan dailies like the New York Times, New York Herald Tribune, Los Angeles Herald and Los Angeles Evening News, to small-town papers as picturesquely named as the Kettle Falls (Wis.) Sun, Yemasee (S. C.) Democrat, Hominy (Okla.) News, Worley (Ida.) Go-Getter (R. 87, Pl. Ex. 12).

The work of *Carl Byoir & Associates*' staff also includes preparation of scripts for radio broadcasts which are subsequently recorded on master waxes at a recording studio; the master record is then returned to 10 East 40th Street for approval and sent from there to the record plant where copies are struck from it and mailed out to approximately 100 or 150 radio stations in various parts of the country; there the scripts prepared at 10 East 40th Street are broadcast over the air waves (R. 94-95, Pl. Ex. 14).

Three of the smaller tenants are engaged in work upon advertising copy, designs and art work (R. 103, 134, 203).*

* George E. Hatch, Willis L. Towne, John F. Yewell.

One places industrial and technical advertising and direct mail advertising and does catalogue work, all of the customers being manufacturing companies, with plants in various states where they produce goods for interstate commerce (R. 104-105). Copy is written on the premises for both technical advertising and direct mail advertising and arrangements are made with printing and engraving shops for reproduction of the material; galley proofs received from the printer are corrected and returned, ready for the run-off (R. 103-106). Direct mail matter is sent out all over the United States (R. 105-106, 108); a substantial part of the technical advertising appears in publications in different parts of the country (R. 108).

Another tenant, engaged in similar work, prepares copy and originates ideas for advertising at 10 East 40th Street which subsequently appears in approximately 100 technical publications throughout the United States with a circulation interstate in character (R. 134-137, Pl. Ex. 21). An architectural artist, occupying a small office, receives blueprints from various architects, magazines and advertising agencies and executes pictures upon architectural subjects, such as reproductions of buildings or drawings or paintings of proposed construction projects; about 50 such drawings are executed a year at 10 East 40th Street some of which are reproduced in magazines of national circulation, such as the Ladies Home Journal and others of which are mailed or shipped by express to architects in various parts of the United States (R. 202-205).

The 10 East 40th Street building also houses several organizations issuing trade publications, including an association of distillers, with membership all over the United States (R. 245-246); an organization furnishing information and advice to stockholders and investors in various states (R. 260-262); a textile research institute with a nationwide membership of textile mills and chemical con-

cerns (R. 190); and a market research and statistical organization in the textile field, furnishing information and statistics to the country's leading rayon producers (R. 292). All of these tenants publish magazines, copy for which is prepared and edited at 10 East 40th Street.

Allied Liquor Industries engages in public relations work, national in scope, including a research department which collects and disseminates information of interest to its membership regarding pending legislation, both in Congress and in various state legislatures (R. 245); releases prepared at 10 East 40th Street are sent out to various newspapers (R. 246-247). The organization's publication is a weekly magazine, with a circulation of 450 covering members and others throughout the country; the editorial work is done at 10 East 40th Street (R. 247).

American Investors Union publishes and circulates a 50-page monthly publication (Pl. Ex. 26) to 3,600 investors, 3,100 located outside of the State of New York, and also gathers and disseminates information and advice of interest to its membership and conducts a regular and continuous correspondence with them in an endeavor to answer their questions regarding investments and investment trusts (R. 262-263). Although the magazine is not printed in the building, the copy is fully prepared there and edited there and the publication is received from the printer and wrapped, addressed and mailed out at 10 East 40th Street (R. 262).

Textile Research Institute uses its office to maintain a regular correspondence with mills throughout the United States involving research and consultation upon textile production problems (R. 190-191). A monthly magazine (Pl. Ex. 23) is edited at 10 East 40th Street, where material is gathered, some of it from research staffs maintained by the Institute in St. Louis and Washington, and rewritten, original material is prepared, and the whole arranged for

publication; from time to time publication instructions are sent to the printer in Lancaster, Pa., who mails out 700 copies of each issue to subscribers, libraries and educational institutions all over the country. (R. 190-192).

Textile Economics Bureau, Inc., a statistical organization, publishes "Rayon Organon" (Pl. Ex. 28), a technical magazine with a circulation of 5,000 per month, at least 60% of which is outside of the State of New York; drafts, charts and statistical tables; edits and prepares material and lay-outs for the press "just as you do for a newspaper," at 10 East 40th Street (R. 293-294). Together with a related organization, *Textile Surveys*, there is also performed statistical work for the rayon industry, including special reports, statistical tables and charts, data for which is gathered and disseminated from the building to approximately 200 mills in various states (R. 294-296, Pl. Ex. 29). Regular correspondence is maintained with Du Pont, Celanese, American Viscose Corp. and other leading rayon producers in collecting market data for statistical reports (R. 294-295).

3. Work of the Various Employees.

In the operation of its office building defendant employed an average of 50 to 60 maintenance workers, including elevator starters, elevator operators, window cleaners, watchmen, porters, mechanics, handymen and painters (finding 9, R. 316; Pl. Ex. 1, R. 310-312). These employees performed such customary duties in connection with the maintenance and operation of the building as the furnishing of heat and hot water; the keeping of elevator, radiator, water and fire sprinkler systems in repair; the maintenance of electric light and power systems and appliances; the operation of elevators carrying tenants and employees, customers and clients of tenants, and other passengers, as well as office furniture and equipment, to

and from tenants' premises; protection of the building and tenants' quarters and property from theft, fire and other damage; repair of hallways, stairways and other common parts of the building; the keeping of the building and tenants' quarters in a clean and habitable condition; renovation of interior parts of the building; and related clerical tasks (Pl. Ex. 1, par. 6, R. 308-309). All of the tenants in the building regularly and continuously had the benefit of and made use of these various facilities (Pl. Ex. 1, par. 7, R. 309; finding 11, R. 317).

The building elevators were used regularly to carry advertising matter, publicity releases, photographic materials, magazine lay-outs, commercial art work, printers' and lithographers' proofs, Diesel engine parts, Ediphone machines and parts, samples of merchandise for which orders were taken in the building, and office supplies (finding 10, R. 316; R. 30-31, 38, 41-43, 70-71, 74-78, 84-86, 92-94, 103-106, 112-117, 134-137, 144-146, 151, 168, 177-179, 188, 190-192, 202-205, 235-236, 239-244, 262-263, 286-289, 61-63). Salesmen, buyers, authors, free-lance artists, advertising copy-writers, customers, messengers and executives, as well as employees who earned their daily bread in the building, made regular use of the elevators, to transact their business or go to or from their work (finding 10, R. 316; R. 21, 28, 35-37, 70-71, 74-78, 91, 99, 115, 167, 169-170, 236-237, 240, 286, 289).

Although most of the tenants occupied less than a full floor, there were several whose operations required more space. Chase Brass & Copper Company leased four floors; Carl Byoir & Associates had one full floor and parts of two others; Cluett, Peabody & Company occupied space on two separate floors, one of which it entirely leased. Both Eastman Kodak Company and Forbes Lithograph Manufacturing Company rented space on floors in widely separated parts of the building; their employees and ex-

ecutives made frequent use of the elevators to go from one department to another carrying with them advertising and publicity copy, photographic materials and commercial art work in course of preparation (finding 10, R. 316; R. 39, 70).

The absolute dependence of the various tenants in this 48-story building upon the work of the building service employees is self-evident. The ordering, producing and interstate marketing of vast quantities of goods of an aggregate annual value of at least \$15,000,000* in transactions negotiated in the building would be interrupted if the elevators ceased to run. In an unheated building the productive processes of commercial art creation, textile design and magazine publication, such as are carried on by Forbes Lithograph Manufacturing Company, Cluett, Peabody & Company and Standard Magazines, Inc. as a closely integrated part of their manufacturing enterprises, could not be carried on in cold weather. Were the water system not kept in repair the various employees, engaged in the offices of the tenants in preparation of advertising materials and sales orders to be forwarded across state lines would be deprived of the customary sanitary facilities without which they obviously could not work. Channels for the orderly and efficient interstate distribution of goods from numerous factories, plants and mines in nineteen states** to customers all over the United States and abroad would be disrupted were the building facilities not maintained. [Compare Section 2 (a) of the Act.]

* The total sales for interstate delivery from out-of-state factories, mines and mills to customers throughout the United States and abroad negotiated through offices in the building approximate \$15,000,000 annually. See references, pages 11, 17-20, 22-27 above, and footnote at page 62.

** New York, Massachusetts, Illinois, Ohio, Tennessee, New Jersey, Maine, Alabama, Virginia, California, Pennsylvania, Connecticut, North Carolina, Georgia, West Virginia, Florida, Washington, Oregon and New Hampshire.

Question Presented.

The sole question upon this appeal is whether the building service and maintenance employees of the 10 East 40th Street building, upon the foregoing facts, were "engaged in commerce or the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

Summary of Argument.

The case at bar was tried upon the theory that respondents were employees engaged in functions "necessary" to "production of goods for commerce" within the meaning of the Act. The pleadings, testimony and exhibits were directed toward this end and this was the principal legal question for determination. On this appeal respondents likewise place their main reliance upon this contention. They urge further, however, that they are also engaged in work so closely related to the regular and continuous conduct by tenants in the building they served of activities in interstate commerce as to be an essential part thereof.

Upon the question of "production of goods for commerce" respondents' argument takes the following form:

1. The test for application of the Act is the duties of the employees and the activities to which they relate, not the general nature of the building, or the employer's business.
2. The tenants in manufacturing enterprises were engaged both in sales and also in executive and administrative work, as an integral part of their productive operations.
3. Despite division of manufacturing, storage, sale, distribution, machine repair and executive direction among different buildings and employers, maintenance workers are necessary to production.

4. Geographical dispersion of the various components of productive enterprise to acquire economic advantage does not remove maintenance employees from intimate relationship to the essential elements producing goods for commerce.
5. Tenants preparing designs, photographic publicity releases, advertising copy, magazine layouts, performed an initial productive step on parts or ingredients of publications intended for interstate distribution.
6. The courts have uniformly recognized that production carries back to the initial stages and have held maintenance workers no closer to ultimate physical distribution of goods in commerce than were respondents here to be necessary to such production.
7. In any event, textile designs, photographs, publicity releases, advertising matter, publication layouts and proofs, commercial art work, were goods produced for commerce in the building.
8. Selling, whether by manufacturers' own forces or by sales agencies, is an essential function in productive enterprises and economically a part of production, particularly where sales are to specification.
9. Authorities relied on by petitioner based contrary conclusions upon doctrine of commerce, not production, and inadequate factual showing; the facts here are adequate and the appropriate test less exacting.
10. The trial court having found respondents' duties were performed to enable the various tenants to conduct their activities conveniently and efficiently and that the tenants regularly had use of the fa-

cilities provided and derived the intended benefit, respondents were clearly necessary to production of goods for commerce by the tenants.

Upon the question of engagement "in commerce" respondents, recognizing the adoption by this Court of the rationale of *McLeod v. Thelkeld*, 319 U. S. 491, nevertheless urge that the doctrine in that case does not extend without further consideration to all employees performing functions which may further the conduct of interstate commerce, but that each case must be determined upon its own facts. Respondents further point to the effect of stipulations and findings here to make out a *prima facie* case establishing that their employment was sufficiently closely related to activities of the various tenants in commerce as to be deemed an essential part of commerce itself. They argue also that this building, by virtue of all the various interstate activities conducted under its roof, was in effect a composite instrumentality of interstate commerce.

I.

Respondents were engaged in occupations necessary to production of goods for interstate commerce within the meaning of the Act and entitled to its benefits.

In its simplest aspect, the case at bar presents an application of the principle laid down by the Second Circuit Court of Appeals in *Borella v. The Borden Co.*, 145 F. (2d) 63 (C. C. A. 2, 1944), cert. granted Jan. 2, 1945, No. 688 for argument with this case. In that respect respondents here might well rely upon the arguments advanced by the respondents in the *Borella* case and by the Government as *amicus curiae*, together with Judge LEARNED HAND's illuminating opinion below. If those arguments commend them-

selves to this Court, then it is submitted that respondents here are entitled to prevail, since a substantial portion of the building at 10 East 40th Street was occupied by tenants in quite the same category as The Borden Co. in the *Borella* case. But quite independently of the rationale of the latter case respondents are nevertheless entitled to prevail for other and different reasons into which the Court may be disposed to inquire further. This brief is therefore directed particularly toward such additional considerations.*

The test for application of the Act is the duties of the employees and the activities to which they relate, not the general nature of the building, or the employer's business.

1. Petitioner, in attacking the decision of the Second Circuit, has characterized the building in which respondents worked as a "typical metropolitan office building", or "multi-tenanted office building", and urged that prior decisions in "office building cases" in various Circuit Courts, a number of which this Court has declined to review, conflict with the result below here (Pet. Br. pp. 2-5, 12, 14). But this would ignore the fact that the appropriate test in determining whether employees have the benefits of the Fair Labor Standards Act is not the general nature of the employer's business or the general character of the building where their work is performed, but rather the *duties* of the employees and the particular *activities* to which the employees' functions immediately relate. *Kirschbaum v. Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet v. North Shore Corp.*, 318 U. S. 125; *McLeod v. Threlkeld*, 319 U. S. 491. And this is the more true where the employees in question are building service

* Italics have been added here for emphasis in quotations from cases, statutes and authorities.

workers whose functions are to take up and down to and from work the tenants and their employees and the materials with which they work, to guard the tenants' property against theft or fire, to keep the tenants' quarters in a state of decent repair, and to maintain the whole premises in a clean and habitable condition. *Kirschbaum v. Walling*, 316 U. S. 517. The result would thus depend, not upon a pre-judgment formulated by characterizing the nature of the building but upon "a practical judgment" after inquiring into the facts of the individual case. *Armour & Co. v. Wantock*, 323 U. S. 126. To accept petitioner's approach to the problem would be to stifle the inquiry at the threshold.

The tenants in manufacturing enterprises were engaged both in sales and also in executive and administrative work, as an integral part of their productive operations.

2. We may begin the inquiry by noting with the trial court that 26% of the rentable area and 29% of the rented space in the building was occupied by manufacturing and mining companies which used their offices for executive and administrative activities,¹ for conferences, for taking orders for substantial quantities of merchandise shipped from their factories and mines to customers in various states and, in the case of seven of these companies, for

¹ See finding 7 (Class 1) [R. 314]. The meaning of "administrative activities" is well-known in industrial management. It extends to those staff departments, such as purchasing, advertising, market research and similar forces which relieve the burden and increase the effectiveness of executive management in large enterprises. "As the managerial process grows in complexity, the time, ability and comprehension of single executives becomes increasingly inadequate and must be supplemented by staff agencies able to furnish specialized assistance and advice. * * * Staff departments do not create new functions but concentrate specialized attention upon certain phases of the management problem." Holden, Fish and Smith, *Top Management, Organization and Control* (1941) p. 36. The trial court recognized this, for it spoke of those manufacturing tenants which "maintain advertising departments in addition to other administrative activities." See finding 6 (parenthetical note following Class 5) [R. 314].

advertising and publicity work as well.² Petitioner draws from this finding only an admission that most of the tenants in this class leased space for sales offices (Pet. Br. pp. 4-5, 8). The record contained testimony of numerous disinterested witnesses; there were no disputed factual issues; and petitioner rested upon respondents' case and called no witnesses. Under the circumstances, recourse to the record for that full survey of the facts which is essential to "a practical judgment" is not unwarranted. Such recourse indicates that in only one or two instances was the work of tenants in the manufacturing group limited to selling; for the most part the manufacturing companies used their space also for such activities as planning and management, designing, market research, raw material purchases, traffic control, advertising and publicity, storage and shipment of goods, preparation of specifications for goods to be produced to order.³

Nor are manufacturers' sales activities, when performed under such circumstances as indicated in the present case, a remote or isolated element in the whole productive picture. Modern industrial enterprises are characterized by the close correlation of manufacturing and marketing func-

² Petitioner has sought to break down the effect of this finding by attempting to demonstrate that in reality, the greater part of the space occupied by these tenants was used "as sales offices only" (Pet. Br. p. 8). In this, petitioner ignores the fact that the finding as to "executive and sales" activities was enumerated in the conjunctive, including sales as only one component element; was supported by an admission in the answer (Pet. Ans., par. 8, R. 13); was drafted by petitioner and to be construed most strictly against the draftsman. Respondents had proposed other findings (R. 321-333). The Circuit Court construed this finding accordingly: "The executive offices of the manufacturing and mining concerns . . . occupy about 26% of the rentable area" (R. 342).

³ Of those singled out now by petitioner as "sales offices," note the following additional activities: *Ames Bag Machine Co.*—purchasing; *J. H. Dunning Corp.*—executive direction; *Thomas A. Edison Co. Inc.*—traffic control of exports and requisition and storage of merchandise; *General Motors Co.*—storage and shipment of goods; *Perolin Co. of N. Y.*—preparation of market estimates and advertising; *Tenn.-Eastman Corp.*—preparations of specifications for goods to order; *Vanity Fair Mills*—preparation of sales forecast and advertising; *S. S. White Dental Mfg. Co.*—preparation of designs and sales engineering. See references above, pp. 17, 19, 20, 21, 22, 26; compare Pet. Brief, page 8.

tions.⁴ An essential part of the successful conduct by the many industrial tenants of 10 East 40th Street of their manufacturing and mining operations at plants throughout the United States is the groundwork of designing, planning, purchasing, market analysis, advertising and salesmanship laid down by office staffs and executives hundreds of miles away from the mines and factories from which the goods are subsequently shipped. Such activities are integrally related to the transformation of raw materials into finished products which will find a ready market with the consumer. The record in both cases clearly reveals that as carried on by large-scale producers such as The Borden Co., Forbes Lithograph Mfg. Co., and Cluett Peabody & Co., both management and marketing functions are a closely-knit part of their productive operations.⁵ No less essential a part of the manufacture of finished goods than the hand that performs a simple mechanical task on the assembly line is the creative talent which conceives the fundamental design from which the goods are reproduced, the driving energy which develops markets for them frequently before they have been manufactured, and the organizing ability which coordinates and controls all of the varied and widespread activities of the producer, all operating together towards the end of producing goods consumers will buy.⁶

The modern tendency towards industrial integration has been aptly summarized by one of the country's leading authorities on merchandising methods:

During the last twenty-five years great changes have taken place in the methods and scale of production *** Following the close of the World War

⁴ Pyle, J. F., *Marketing Principles* (1931), page 17.

⁵ See also Frey, A. W., *Manufacturers' Product, Package and Price Policies; Modern Merchandising* (1941), page 17.

⁶ See Converse, Paul D.; *Elements of Marketing* (2nd Rev. Ed., 1940) Chap. 31.

producers found themselves with excess capacity. Consequently they were forced to devise ways and means of stimulating demand for the goods they were equipped to manufacture. Improved methods of sales promotion, advertising, salesmanship, instalment selling, prompt and immediate delivery and other forms of service were manifested along with improvements in production designed to reduce cost *** Since 1920 there has been a decided turn toward marketing goods in direct line from producer to consumer.

From the point of view both of economic theory and of practical industrial management, the marketing and distribution of goods are treated as a vital part "of all productive activities".⁷ The merchandising function "must be performed in every manufacturing enterprise, large and small, from United States Steel Corporation and General Motors down to the one-man shop".⁸ A major problem of modern industry is to adjust production capacity and the supply of goods to present and future market needs. "This coordination of production and marketing demands on the part of industrial management a definite knowledge of what to produce, how much to produce and where to produce. This information can be secured only after learning who can and will buy. *** The ideal is to determine in advance the market potentials and then gear production accordingly."⁹

⁷ Pyle, J. F., *Marketing Principles* (1931) page 12 ff.

⁸ See Converse, Paul D., *Elements of Marketing* (2nd Rev. Ed., 1940) page 1 ff.; Converse, Paul D., *Essentials of Distribution* (1936) page 3.

⁹ Frey, A. W., *Manufacturers' Product, Package and Price Policies; Modern Merchandising* (1940) page 5.

¹⁰ Pyle, J. F., *Marketing Principles* (1931) page 28. See also Barker, C. W., *Modern Marketing* (1939) page 1 ff.; Converse, Paul D., *Essentials of Distribution* (1936) page 15. Agnew, H. E. and Houghton, D., *Marketing* (1941) page 18, citing Ruskin's essay *Unto This Last* (1851): "Consumption absolute is the end, crown and perfection of production *** Production does not consist in things laboriously made, but in things serviceably consumable."

In view of these essential facts implicit in modern industrial organization, to deny that the functions of purchasing, designing, planning, advertising, selling and management carried on in manufacturers' executive and administrative and sales offices at 10 East 40th Street are an integral part of the "production of goods for commerce" by these manufacturers would be to ignore economic realities. In its most recent consideration of the reach of the Act in cases involving "production" this Court recognized that

More is necessary to a successful enterprise than that it be physically able to produce goods for commerce. It also aims to produce them at a price at which it can maintain its competitive place, and an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production rather than to volume of production.

Armour & Co. v. Wantock, 323 U. S. 126.

And the Administrator of the Wage and Hour Division from an early date in the Act's enforcement recognized the intimate relationship to "production" of work of manufacturers' office forces and advertising staffs, although performed at a distance from the plant where the goods are turned out.¹¹ This view, based upon "considerable experience" and providing a "practical guide", is "entitled to respect". *Skidmore v. Swift & Co.*, 323 U. S. 89 L. Ed. 125.

¹¹ Opinion Manual of the General Counsel, Wage and Hour Division, U. S. Department of Labor (1940) Vol. I, pages 27, 34:

"Employees in office forces are 'engaged in production of goods for commerce' even though they do not perform their work at plant where goods are produced" (12-5-38-Wise, Whitney & Canfield-260.)"

"Employees of art department of rubber company making set-ups for advertising department of concern are engaged in the production of company's products, as relationship between production of goods and creation of art work for use in advertising goods is so intimate as to warrant such a conclusion. (3-24-39-Raymond J. Finley-043.)"

Despite division of manufacturing, storage, sale, distribution, machine repair and executive direction among different buildings and employers, maintenance workers are necessary to production.

3. Turning now to the problem of legal interpretation, we may perhaps best proceed as did Judge LEARNED HAND in *Borella v. The Borden Co.*, with the inquiry whether employees in respondents' position are within the statute when they perform their work in a building where all the activities of manufacture and sale, together with the administrative direction of the business, take place under one roof. Authorities do not lack that under such circumstances watchmen, mechanics and other maintenance employees similar to respondents here are engaged in activities "necessary" to production and thus within the statute's protection.¹² And the same result appears to be indicated where the various components of productive enterprise such as manufacture, sale, executive direction, storage and shipment of goods are divided among several buildings not at the same physical location.¹³ Nor have the courts cre-

¹² *Fleming v. Atlantic Co.*, 40 F. Supp. 654, 657 (N. D. Ga. 1941) affd. 131 F. (2d) 518 (C. C. A. 5, 1942); *Fleming v. Swift & Co.*, 41 F. Supp. 825, 830 (N. D. Ill. 1941) affd. 131 F. (2d) 249 (C. C. A. 7, 1942); *Fleming v. Hamlet Ice Co.*, 1 Wage Hour Cases 764, 4 Labor Cases par. 60,676 (E. D. N. C. 1941) affd. 127 F. (2d) 165 (C. C. A. 4, 1942), cert. den. 317 U. S. 634. In the *Atlantic Co.* case the court recognized that "services of clerical help * * * are essential to production * * * such employees are employed in producing, handling and working on * * * goods * * * the services of the clerical help * * * are so intimately and directly connected with * * * production and sale * * * as to be an essential part thereof" (40 F. Supp. 654, 657). Here was recognition of the "integrated" theory of production and of the immediate necessity of maintenance work to all of the component elements.

¹³ *Johnson v. Phillips-Butterff Mfg. Co.*, 178 Tenn. 559, 160 S. W. (2d) 893 (Sup. Ct. Tenn. 1942), cert. den. 317 U. S. 648; *Strough v. Coll.*, 6 Wage Hour Rept. 615, 7 Labor Cases par. 61,644 (E. D. Pa. 1943). In the *Johnson* case, a watchman employed by a manufacturer covering different buildings housing the executive offices, wholesale warehouse and wholesale-retail selling outlets was held necessary to production. The principal manufacturing operations took place at a separate location. See *Walling v. Phillips-Butterff Mfg. Co.*, 57 F. Supp. 543 (M. D. Tenn. 1944). In the *Strough* case, plaintiff worked as a watchman and handymen, sometimes assisting with crating of goods for shipment, at a building where goods were stored and distributed at a separate physical location from the employer's manufacturing plant.

ated an artificial distinction where the various functions, such as manufacture, maintenance of machinery, storage and distribution, are divided not only among several buildings but among a number of employers. Thus within the ambit of the Act as engaged in a "process or occupation necessary to production" is a night watchman employed by a warehouse to guard a building where tobacco is stored for aging, then later shipped to manufacturers of nationally-distributed brands of cigarettes, work held "necessary to production of the manufactured product of the stored tobacco";¹⁴ an engineer, a watchman and a truck driver of an employer performing processing on boxes, later finished at a separate plant and then delivered to customers in the same state who packed their products in the boxes and shipped them in commerce;¹⁵ a clerical staff serving maintenance men of a separate machine repair company maintaining factory equipment for manufacturers producing goods for commerce.¹⁶ Compare *Kirschbaum v. Walling*, 316 U. S. 517.

Geographical dispersion of the various components of productive enterprise to acquire economic advantage does not remove maintenance employees from intimate relationship to the essential elements producing goods for commerce.

4. Petitioner's principal objection to the result reached by the Second Circuit is that executive and administrative

¹⁴ *Reliance Storage Co. v. Hubbard*, 50 F. Supp. 1012 (W. D. Va. 1943).

¹⁵ *Walling v. Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544, 7 Labor Cases par. 61,724 (D. Minn. 1943).

¹⁶ *Holland v. Amoskeag Machine Co.*, 44 F. Supp. 884 (D. N. H. 1943).

See also *Roland Elec. Co. v. Walling*, 146 F. (2d) 745 (C. C. A. 4, 1945)—where mechanics and office employees of an electrical concern repairing and reconditioning used motors for manufacturing companies within the same state, for use in producing goods for commerce, were held "engaged in the production of goods for commerce" within the meaning of the Act. The court stated that "the services rendered to producers of goods for interstate commerce in the installation and repair or wiring, and the repair, servicing and reconditioning of motors are sufficient without more to bring the employees of the company under the Act."

and marketing functions fulfilled by the manufacturers' office forces and executives at 10 East 40th Street are many miles removed from the actual scene of factory and mine operations (Pet. Br. pp. 2-4, 12-13). This is apparently the basis for the further contention that the building service employees contributing to convenient and efficient operation of the tenants' activities are too remotely connected with production to be regarded as engaged in "any process or occupation necessary to the production thereof in any State" (compare Pet. Br. pp. 2-4, 9-10).

But it is manifest from the precise language of the Act that Congress foresaw the application of this definition to the widespread activities of producers performing various steps, processes and operations ultimately resulting in the distribution of goods in commerce dispersed through a number of different states to their own economic advantage. Thus Congress used the exhaustive phrase "any process *** in *any State*", in the definition of "production" in Section 3 (j). Indeed, this Court has recently held that the enumerated activities in Section 3 (j) following the word "produced" are to be read to relate to "all steps whether manufacture or not, which lead to readiness for putting goods into the stream of commerce," including "every kind of industrial operation preparatory" to such distribution. *Western Union Tel. Co. v. Lenroot*, U. S. , 89 L. Ed. 289. The work of the manufacturing and mining tenants at 10 East 40th Street was such preparatory activity and constituted "production for commerce" even without recourse to the further extension of the comprehensive definition to "any process" necessary thereto.

Further, petitioner's argument that respondents' activities were far removed from production is based on a conception of geographical removal from "actual production at distant places" (Pet. Br. pp. 2, 4, 12-13). But since

Kirschbaum v. Walling, 316 U. S. 517, this Court has recognized that maintenance employees may be "necessary" to production without regard to manual participation in machine operations. See also *Walton v. Southern Package Corp.*, 320 U. S. 540; *Armour & Co. v. Wantock*, 323 U. S. 126. If the functions of maintenance employees may be deemed "necessary" to production although performed in a part of the building distant from the machine processes, at a time when machine operations are stilled, or in a separate building, as in the cases upon which this Court has passed, no compelling reason appears why the tie with production is any less "necessary" where the maintenance work is in a distant city, particularly where it provides the means toward efficient conduct of steps in production and direction of vast productive enterprises.

The activities of great manufacturing companies engaged at 10 East 40th Street in creating designs identically reproduced in each item of finished product turned out at out-of-state plants, transmitting to mills and factories detailed production instructions, purchasing all the raw materials essential to manufacture of nationally distributed products, taking and forwarding orders for goods to be produced to specifications, devising advertising on a national scale, formulating selling programs and speeding deliveries, planning and coordinating productive operations and performing all of the other functions integrally related to successful and efficient conduct of industrial enterprises "producing goods for commerce, have no mere "tenuous relation to production"—they are indispensable in its conduct. It follows that building maintenance employees serving these tenants regularly and continuously are "necessary to the production".

Tenants preparing designs, photographic publicity releases, advertising copy, magazine layouts, performed an initial productive step on parts or ingredients of publications intended for interstate distribution.

5. Nor may we ignore the fact that "goods" were directly and specifically physically "produced" for commerce within the meaning of the Act in the 10 East 40th Street building. "Producing" and "working on" goods in the formative stages of production were those tenants preparing designs, taking and developing photographs, writing advertising copy and publicity releases, editing and laying out magazines and publications, arranging and correcting manuscripts and printers' proofs, and depicting commercial art conceptions. The Second Circuit held here that "the publicity concerns which design a substantial part of the advertising material, lithographed and printed matter, etc., which are shipped in interstate commerce come within the definition" of "production" 146 F. (2d) 438, 440. Such tenants by a preliminary process which is the initial step in a series of operations culminating in the manufacture of finished magazines, advertising displays and other printed and lithographed matter for interstate distribution in vast quantities perform work upon a "part or ingredient" of such goods. Since the benefits of the overtime provisions of the Act extend to all those engaged in "production of goods for commerce", it is obvious that the definition of "goods" in Section 3(i) is no less important than the definition of "production" in Section 3 (j) in determining whether employees come within the Act. See *Western Union Telegraph Co. v. Lenroot*, U. S. 89 L. Ed. 289.

There can be little doubt, to take but one example, that the art motifs conceived and worked upon in the building by Forbes Lithograph Mfg. Co. artists and sent to the Chelsea, Mass. plant of the company to be identically re-

produced, and subsequently distributed throughout the United States, involved an essential "process" in the production of a "part or ingredient" of the materials turned out on the company's out-of-state presses. The very use by witnesses in the industry of the term "*reproduction*" to describe such plant operations (R. 38, 59-60) indicates a concept of the basic creative work as constituting original "production".

The legislative history of Section 3 (j) further confirms the position that the preparation of designs, art concepts, packaging and container models and similar items, identically reproduced by subsequent plant operations comes within the definition of "production". Earlier drafts of the provision later enacted as Section 3 (j) did not contain the clause "in any process or occupation necessary to the production thereof, in any State". Instead, the proposed definition included the phrase "in the making of tools and dies used in the production of such goods in any State". See S. 2475, 75th Cong., 1st Sess., Sec. 2(a)(24), May 24, 1937; H. R. 7200, 75th Cong., 1st Sess., Sec. 2(a)(24), May 24, 1937. Subsequently Congress substituted the obviously broader language of Section 3 (j) as enacted. Accordingly, there can be little question of congressional intention to include work in the making of patterns, models and designs serving as an initial step in the successive processes of production.

Similar considerations apply in the case of tenants using space rented in the building for the conduct of publishing, advertising and publicity activities. Editorial work at 10 East 40th Street in arranging, preparing and correcting magazines, trade publications and advertising and publicity copy subsequently identically reproduced at plants elsewhere is a preliminary "process" of "production" of a "part or ingredient" of the publications in which the work appears, upon ultimate issue, for national distribution.

Both in common understanding and in trade usage publishing activities are commonly regarded as, an integral part of production of items of the graphic arts. And this is true of preparation and issuance of printed and lithographed matter whether performed by the printer or in a separate publishing office.¹⁷

As outlined by one authority on modern "magazine making",¹⁸ editorial activities are clearly steps in the closely integrated processes which together constitute the manufacture of magazines—steps which contribute both to economy and to continuity of production:

A manuscript follows a perfectly definite routine in its progress from the editor to the reader. Having been scheduled for publication, it goes to the copy reader, who prepares it for the printer. It is then set, and the first or "office" proof is taken and corrected. The next set of proofs is sent to the editor as "author's proof" or "first proof". These are usually galley—that is, proof taken from type placed in the galley before it has been paged. * * *

In this stage, while the printed matter is still strung out on long sheets of paper * * * changes are more easily and less expensively made than later. * * * Corrections having been indicated, the proof is returned to the printer who makes necessary changes in type * * *. The printer also divides the long galley of type into pages and then submits a new set of "page proofs". * * * It is usually advisable to check carefully each line in which a correction * * * has been made. * * * All such matters

¹⁷ Sixteenth Census of the U. S., *Census of Manufactures* (1939), Vol. II, part 1, page 679, Group 8—*Printing, Publishing and Allied Industries*: "The group includes publishers doing no printing, publishers doing their own printing, and printers doing no publishing."

Executive Office of the President, Bureau of Budget, *Standard Industrial Classification Manual* (1941), Vol. I, page 3: "Printing, publishing, and industries servicing the printing trades are classified as manufacturing industries."

Sixteenth Decennial Census, U. S. Bureau of Census, *Instructions to Enumerators for Business and Manufactures* (1939), page 16: "Establishments engaged in printing or in publishing (with or without printing) * * * are also included in the census of manufactures."

¹⁸ Bakeless, John, *Magazine Making* (1931), page 97 ff.

should be carefully scrutinized before copy leaves the editorial office. When copy goes to the printer it should correspond in every particular to the article as the editor wishes it to appear.

The problem of reading and editing manuscripts is noted by this authority¹⁹ in the following terms:

The first problem is recording the manuscript and, after that, keeping track of it as it passes from hand to hand in the editorial room. * * * It is the first reader's duty to reject out of hand the plainly impossible scripts. * * * Once past the first reader, the manuscript is still little more than started on its way. The relatively small sheaf that is considered worth passing on to another editor is now parcelled out among the staff according to their special interests. * * * Almost all authors over-write and their work must normally be somewhat reduced in length by the editor.

Nor is there any question that the editor must understand printing sufficiently to perform his vital part in the making of magazines:²⁰

The editor must understand printing at least sufficiently to give the printer clear instructions and sufficiently also not to demand what is plainly impossible * * *. The editor and his assistants require only such knowledge of printing processes and problems as will promote their own efficiency. Their knowledge naturally must begin at the point where the purely editorial processes first come into contact with mechanical processes—with type and type setting.

In other words, the magazine editor holds the whole thing together.²¹ Not least among the editorial functions

¹⁹ Work last cited, page 150 ff.

²⁰ Work last cited, Chap. 3.

²¹ Lohn, Lenox R., *Magazine Publishing* (1932), Chap. 1.

is "liaison with the printer", that is handling of proofs, correcting of grammatical and typographical errors, making up of dummy format to show exact arrangement of stories, articles, advertisements, etc.; this "includes indicating size of type, indentations, character of type faces, leadings, subtitles, footnotes and special instructions."²² This was the work done at 10 East 40th Street by the publishing tenants; the close integration with printing operations is apparent.

Advertising is also "produced", in trade parlance.²³ Even where copy is not written by the advertiser, a good part of the company advertising manager's work is "of a creative nature." In this connection "he is responsible for a variety of activities that have to do with devising and giving form to the company's advertising."²⁴ And where an outside agency prepares actual copy, the advertising manager still has definite production responsibilities:²⁵

For instance, in a typical company the advertising manager checks and approves the layout, copy, and art work for correctness, effectiveness, and compliance with company policy. He holds frequent conferences with the copy and idea men in the agency to direct and approve their work. He studies competitors' copy. He assembles ideas for advertising from various outside sources and cults and translates them into practical application. In this company the advertising manager performs the function of acting as a clearance point between the agency and the executives of such departments as sales, engineering, legal, etc., as well as the general management, all of whom are directly interested in the ad-

²² Work last cited, page 37.

²³ Dippy, A. W., *Advertising Production Methods* (1929) page 1, ff.; Metropolitan Life Insurance Co., Policyholders Service Bureau, *Functions of the Advertising Manager*, pages 17-19.

²⁴ Work last cited, pages 15-16.

²⁵ Work last cited, page 17.

vertising copy. The company requires that all advertising copy be submitted before publication.

Here, too, "the handling of typography enters largely into advertising production".²⁶

This was the work done by advertising managers of such tenants as Beechnut Packing Co. and Vanity Fair Mills. The publicity offices of Eastman Kodak and Carl Byoir & Associates, Business Organizations, and all of the trade organizations and the technical advertising agencies, wrote the actual copy in the building. Perolin Co. of N. Y., Arkell Bag Co. and Forbes Lithograph both prepared copy in the building and sent out from there the materials worked upon. Cluett Peabody & Co. produced some types of its advertising at 10 East 40th Street, dealt through outside agencies as well.²⁷

The view that advertising, publishing and collection and dissemination of trade information under such circumstances constitutes "production of goods" was adopted by the Administrator from an early date in the Act's enforcement. In 1938 he stated as his opinion²⁸ for the guidance of the public:

It seems clear that the term "goods" includes publications, pamphlets, or any other written materials. Accordingly, employees engaged in collection and dissemination of information transmitted to other States in form of publications, pamphlets, or any other written materials are engaged in production of goods for commerce even though the actual work of printing may be done by an independent printing establishment. Typically this would apply

²⁶ Work last cited, page 23.

^{27a} See references above, pages 11-17, 21, 23, 25-33; Appendix, Tables II, IIIa.

²⁷ Wage and Hour Division, U. S. Dept. of Labor, Interpretative Bulletin No. 5, par. 8, 1942 Wage and Hour Manual, page 27. The Bulletin was originally issued December 2, 1938 and revised without substantial change in this paragraph on November 27, 1939. See also Wage and Hour Division, U. S. Dept. of Labor, First Annual Report of the Administrator (1939) pages 15-18.

to employees of organizations such as trade associations and research and compilation services.

And the Administrator likewise, soon after the Act became effective, in response to numerous inquiries from employers, employees and attorneys, advised inquirers that the benefits of the Act extend under the definition of "production" to commercial art work, to the taking, developing and finishing of photographs and to the preparation of articles and advertising material for publication, where such items are ultimately incorporated in finished goods distributed nationally.²² Under the circumstances, these opinions constitute "a body of experienced and informed judgment to which courts and litigants may properly resort for guidance". *Skidmore v. Swift & Co.*, 323 U. S.

89 L. Ed. 125. They become the more persuasive in the present regard in the light of the recent indication by this Court that the comprehensive definition in Section 3 (j) "catches up into the category of production every step in putting the subject of commerce in a state to enter commerce." *Western Union Tel. Co. v. Lenroot*, U. S., 89 L. Ed. 289.

While the question has been little litigated, authorities do not lack that employees in respondents' position here are "necessary" to the "production of goods for commerce"

²² Opinion Manual of the General Counsel, Wage and Hour Division, U. S. Department of Labor (1940) Vol. 1, pages 26, 34, 31.

"Generally, employees of trade associations are deemed to be within coverage of Act. Employees engaged in clerical work of association and in work incidental to preparation of publications of association are under Act. (5-11-39-Texas and Southwestern Cattle Raisers Association, Incorporated-0161.)"

"Commercial artist who plans, arranges, and paints in lettering used in advertisements ultimately printed in publications and magazines having a national circulation is entitled to benefits of Act (6-5-39-Jack A. Nadel-0216.)"

"Employees engaged in taking pictures in temporary studios located outside state and employees engaged in connection with work of finishing pictures in a studio located within state, after which the pictures are sent to patrons outside state, are entitled to benefits of Act. (1-18-39-Montgomery Studios-618.)"

where they perform, even in another's employ, functions auxiliary to publishing, advertising, and printing operations.²⁹ It appears that the combination of space leased at 10 East 40th Street by tenants engaged in advertising, publicity, and trade publication work with space occupied by tenants in the manufacturing class for advertising, publicity and editorial offices totals more than 20% of the rentable area.³⁰ Thus not only were the individual activities of these various tenants, substantial in relation to goods ultimately shipped in commerce, but a substantial portion of the entire space in the building was regularly and continuously devoted to such activities. Respondents who served these tenants were, therefore, entitled to the benefits of the Act, as "necessary" thereto.^{30a}

²⁹ See *Walling v. Allied Messenger Service*, 47 F. Supp. 773 (S. D. N. Y. 1942); *Schneck v. 386 Fourth Ave. Corp.*, 182 Misc. 1037; 49 N. Y. Supp. (2d) 872 (City Court, N. Y. C., N. Y. Co. 1944); *Bittner v. Chicago Daily News*, 7 Wage Hour Rept. 1173, 9 Labor Cases par. 62,479 (N. D. Ill. 1944). See also *Walling v. Higgins*, 47 F. Supp. 856 (E. D. Pa. 1942)—pasting up of advertising sample books to be sent by mail by advertisers to their customers is "production of goods for commerce"; *Walling v. Sun Publishing Co.*, 47 F. Supp. 180 (W. D. Tenn. 1942) aff'd. 140 F. (2d) 445 (C. C. A. 6, 1944)—functions of reporting, editorial selection, preparation for printing, transmission of copy and proofs by mail and gathering, preparing, printing and circulating by mail news matter are "production of goods for commerce."

³⁰ See Appendix, Tables II and IIa, indicating a total of 52,353 square feet (15,520 + 37,015) occupied for these purposes. The total rentable area was 234,245 square feet. See also findings 5, 6 (class 5 and parenthetical note following 5 and 7 (class 1 and class 5) [R. 313-315]. Petitioner's answer conceded that 10% of the space was leased to "advertising and photographic studio companies" (R. 13). This does not include the manufacturing companies occupying space for advertising purposes or Standard Magazines. See footnote 26a above and Pet. Brief, page 6, fn.

^{30a} Petitioner makes much of an assumed absence of a "close and immediate tie" to production of this character and a somewhat ambiguous finding as to the volume of such business as compared with the entire volume of business of all of the tenants in the building. The latter, if relevant, is not based on the record, for there was no testimony as to the activities of half of the tenants, and none as to the volume either of their business or of the entire business of all tenants. [With Pet. Br., pp. 5, 13, 28-30; finding 6 (Class 5), 7 (Class 5), 8 (R. 313-316); compare findings 10-11 (R. 317) and discussion under sub-headings 9 and 10 of the present point in this brief.]

The courts have uniformly recognized that production carries back to the initial stages and have held maintenance workers no closer to ultimate physical distribution of goods in commerce than were respondents here to be necessary to such production.

6. This Court has not hesitated to recognize that the concept of "production" carries back to the initial stages, no matter where or by whom performed. See *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, which applied the Act to employees of a contractor drilling for oil, the well being brought in by a different crew and, after refining elsewhere, distributed in commerce. Compare *Western Union Telegraph Co. v. Lenroot*. And the work of watchmen, mechanics, handymen and other maintenance employees has been frequently held "necessary" to preliminary processes of production or to the turning out of "a part or ingredient" of finished goods eventually moving into the stream of commerce, in numerous cases where the employees' work was no closer to ultimate physical distribution of goods in commerce than was that of the workmen at bar.

Thus, the Act has been applied to (1) a watchman guarding a pipeline used to convey crude oil from a well to a refinery in the same state where, after processing, refined products were shipped in commerce³¹; (2) mechanics repairing and oiling grain elevator machinery and purchasing and receiving grain subsequently sent to a mill in the same state for processing into flour for commerce³²; (3) maintenance men of a water supplier keeping in trim the borders of irrigation ditches to prevent impediment to continued flow of water to farmers and miners who used the water in the same state as an element in producing their

³¹ *Mid-Continental Pipe Line Co. v. Hargrave*, 129 F. (2d) 655 (C. C. A. 10, 1942).

³² *Noblesville Milling Co. v. Murray*, 131 F. (2d) 470 (C. C. A. 7, 1942) cert. den. 318 U. S. 775.

products for commerce³³; (4) a watchman guarding an idle oil rig after completion of one job, prior to removal to another site for drilling a new well in production of oil for commerce³⁴; (5) handlers in a scrap-iron yard, sorting scrap subsequently melted down for use in the same state in producing steel later incorporated as a component part in construction of ships³⁵; (6) maintenance employees repairing tracks and equipment and cutting fuel for engines used to convey raw sugarcane from farms to Puerto Rican mill where sugar was refined for removal to warehouses from which it ultimately moved from the island in commerce³⁶; (7) mechanics repairing equipment for a logger felling timber in the forest for sale to a match company in the same state which manufactured and shipped the finished matches in commerce³⁷; (8) a watchman at a river landing stage guarding coal barges en route from mines to ovens making coke for subsequent use in the same state in the processing of steel for commerce³⁸; (9) an engineer of a development company supplying power to motion pic-

³³ *Reynolds v. Salt River Water Users*, 143 F. (2d) 863 (C. C. A. 9, 1944) cert. den. 65 Sup. Ct. 117.

³⁴ *Robertson v. Oil Well Drilling Co.*, 47 N. M. 1, 131 Pac. (2d) 978 (Sup. Ct. N. M. 1942).

³⁵ *Bracey v. Luray*, 138 F. (2d) 8 (C. C. A. 4, 1943). See also *Robinson v. Larue*, 178 Tenn. 197, 156 S. W. (2d) 432 (Sup. Ct. Tenn. 1941), involving a watchman at a similar scrap yard.

³⁶ *Calaf v. Gonzalez*, 127 F. (2d) 934 (C. C. A. 1, 1942); *Bowie v. Gonzalez*, 117 F. (2d) 14 (C. C. A. 1, 1941); *Gonzalez v. Bowie*, 123 F. (2d) 387 (C. C. A. 1, 1941); *Collazo v. Gonzalez*, 5 Wage Hour Rept. 387 (C. C. A. 1, 1942). See also *Flores v. Baetjer*, 1 Wage Hour Cases 728, 4 Labor Cases par. 60,673 (D. P. R. 1941).

³⁷ *Allen v. Moe*, 39 F. Supp. 5 (D. Ida. 1941). Employees performing the "first step" in the productive process have been held "engaged in the production of goods for commerce" even where the only commodities moving out-of-state are by-products processed from waste materials elsewhere. See *Peoples Packing Co. v. Walling*, 132 F. (2d) 236 (C. C. A. 10, 1942) cert. den. 318 U. S. 774; *Sykes v. Lochmann*, 156 Kan. 223, 132 Pac. (2d) 620 (Sup. Ct. Kan. 1943) cert. den. 319 U. S. 753; *Brooks Packing Co. v. Henry*, 192 Okla. 533, 137 Pac. (2d) 918 (Sup. Ct. Okla. 1943).

³⁸ *Shepler v. Crucible Fuel Co.*, 6 Wage Hour Rept. 185, 6 Labor Cases par. 61,444 (W. D. Pa. 1943) reversed on other grounds 140 F. (2d) 371 (C. C. A. 3, 1943).

ture studios turning out film negatives for ultimate national release³⁹; (10) a cook's helper serving meals to loggers in a lumber camp near site where the employer engaged in cutting pulp wood subsequently sold to a paper company for conversion within the same state into products distributed throughout the country.⁴⁰

The only distinction between the functions of the maintenance employees in all of these cases and those performed by the respondents at bar is that there the employees facilitated processes and operations involving manual labor, whereas here they served white collar workers. Of course, this distinction is one without a difference insofar as the comprehensive definitions in Sections 3(i) and 3(j) of the Act are concerned. This Court has recently indicated that "goods" within the meaning of Section 3(i) includes messages, orders, information and intelligence, such as are customarily worked upon by white collar workers. *Western Union Tel. Co. v. Lenroot*. The exemption provided in Section 13(a)(1) for bona fide executive, administrative and professional employees is further indication of the congressional understanding that the Act's scope would extend to activities of such employees in the absence of the exemption. To construe Section 3(i) broadly, while at the same time limiting application of Section 3(j) more narrowly here, would exclude the contribution of white collar workers and those who serve them to production, "infer congressional idiosyncracy" and "impute to Congress a desire for incoherence *** where policy justifies none."⁴¹ The definitions of "production" and "goods" together im-

³⁹ *Richardson v. Delaware Housing Assn.*, 6 Wage Hour Rep. 472, 7 Labor Cases par. 61,583 (S. D. Fla. 1943). See also *N. M. Public Service Co. v. Engel*, 145 F. (2d) 636 (C. C. A. 10, 1944).

⁴⁰ *Hanson v. Lagerstrom*, 133 F. (2d) 120 (C. C. A. 8, 1943). See also *Consolidated Lumber Co. v. Womack*, 132 F. (2d) 101 (C. C. A. 9, 1942). These cases were cited with apparent approval in *McLeod v. Threlkeld*, 319 U. S. 491.

⁴¹ *Kiefer v. R. F. C.*, 306 U. S. 381, 393-394.

plement the single phrase "production of goods for commerce"; they are to be read as one definition. So reading them, the maintenance employees in the present case were just as closely related to steps in the productive process as carried on by the tenants at 10 East 40th Street as were the maintenance employees in the other cases cited. Here, as there, the work in question obviously contributed both to economy and to continuity of production.

In any event, textile designs, photographs, publicity releases, advertising matter, publication layouts and proofs, commercial art work, were goods produced for commerce in the building.

7. Apart from what has been said above about such items as part of subsequently published matter, the photographic prints, advertising copy, publicity releases, commercial art paintings, magazine manuscripts and printers' proofs prepared and worked upon at 10 East 40th Street, as well as the textile designs, were themselves "goods" within the meaning of Section 3(i). The definition extends to intangible "subjects of commerce". *Western Union Tel. Co. v Lenroot*. These were tangible "articles of commerce."⁴² The use by Congress of the word "articles" which in one of its common meanings includes written

⁴² See also Opinion Manual of the General Counsel, Wage and Hour Division, U. S. Dept. of Labor (1940) Vol. I, pages 25,162:

"Employees engaged in typing envelopes, folding sheets, and sealing envelopes containing a pamphlet or book which is shipped in interstate commerce are engaged in production of goods within meaning of word 'produced' under Section 3 (j) and are entitled to benefits of Act (3-24-39-F. T. Brennen-046.)"

"Employees engaged in finishing and developing roll films originating all over United States and returned to such places are entitled to benefits of Act. Under Section 3 (j) an employee is engaged in production of goods for commerce if he is employed in producing, manufacturing, etc., or in any other manner working on goods in any state. (12-28-38-Eastman's Studio-439.)"

These opinions become the more persuasive in the light of the fact here that such items were frequently shipped in bulk, involved creations of such large size that they could not be sent by mail and were crated preparatory to shipment by express (R. 31, 38, 41, 86).

manuscripts and printed items is not without significance. These creative items not only were intended to be but actually were regularly and continuously shipped across state lines by mail and express to newspapers, magazines, printing plants and mills in other states. Those engaged in their preparation were thus producing "for commerce" within the meaning of the Act. See *U. S. v. Darby Lumber Co.*, 312 U. S. 100, 117, 118.

While it is not necessary to the result here, it may be urged further that the preparation of telegraph messages and sales orders, such as were regularly and continuously formulated in the building by many of the tenants in regular pursuit of their business purposes, prior to interstate transmission by the government mails or the telegraph company, constituted "production of goods for commerce" within the meaning of the Act. *Western Union Tel. Co. v. Lenroot*, citing *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 356. The constant flow of such messages has been conceded.⁴³ Compare *International Text Book v. Pigg*, 217 U. S. 91, 106-107.

Selling, whether by manufacturers' own forces or by sales agencies, is an essential function in productive enterprises and economically a part of production, particularly where sales are to specification.

8. Finally, the work of a number of manufacturers' and mine sales agents at 10 East 40th Street in taking orders for millions of dollars worth of goods annually and forwarding such orders with shipping instructions, to arrange for and speed shipments, was clearly one of those steps "which lead to readiness for putting goods into the stream of commerce" at out-of-state mines and mills. Compare *Western Union Tel. Co. v. Lenroot*. It would be difficult

⁴³ See stipulation, par. 9 (R. 309). Petitioner has further conceded that a number of tenants occupying a significant amount of space were "trade organizations whose principal function is to gather and disseminate trade information" (Pet. Br., p. 6).

to imagine how the stream of goods could be made ready for commerce at shipping platforms and pit-heads were such orders and instructions not regularly received. And this is the more true in the case of orders taken for goods to be manufactured to specification or upon order, of which there were numerous evidences here.⁴⁴ In the latter case, it is obviously the order which starts the production line rolling.

The record makes clear that the sales offices are in regular and continuous touch by mail, telephone and telegraph with those who man the wheels of industry and ship the finished goods. Indeed, it is this very ease of communication which enables the nation's leading manufacturers and mining concerns to avail themselves of the economic advantage of locating their sales offices or sales agencies in the nation's principal financial or merchandising centres, where their customers may be centrally and readily served. Further, it is this economic advantage which makes possible the housing in one "skyscraper", such as the 10 East 40th Street building, of the pulses which initiate and lend direction to production and to that "orderly and fair marketing of goods in commerce" to

⁴⁴ A sales agent for several Virginia and West Virginia coal mining companies sells \$1,250,000 worth of coal annually for delivery across state lines, transmits shipping instructions, forwards orders from 10 East 40th Street (R. 109-110). It has been stipulated that these operations typify activities of some ten other tenants who are agents for manufacturers of textiles, chemicals, terra cotta products and other goods (R. 301-302). Other manufacturers' agents market: rayon yarns, by sales both from stock and made up to order at Tennessee mills, at least \$300,000 per year, sending orders and instructions for routing shipments (R. 116-121; Pl. Ex. 17); antimony metals and oxide, yearly sales exceeding \$2,000,000, for shipment from Texas smelter plant, bills of lading sometimes prepared and forwarded from 10 East 40th Street (R. 201-202); tobacco products, in agent's special brands, gross volume per annum approximately \$500,000 for delivery from Florida and Pennsylvania plants, shipping instructions transmitted with order (R. 230-234); paper, both sold from stock and made up to specifications, by mills in several states, grossing \$500,000 per year (R. 252-256); tubes and bottle taps, all produced to specifications sent with order to West Virginia factory, sales averaging \$150,000 per year (R. 290-292). "As a result of the efforts of these agencies substantial amounts of merchandise of substantial value are shipped across state lines from factories, mines and warehouses" (finding 7, class 2) [R. 314]. [Italics added.] About half of the manufacturing tenants also take orders for goods to be produced to specifications. See references, pages 11, 18, 19-23 above.

which the Congress referred in its findings of fact and declaration of policy in Section 2 of the Act. The Circuit Court here recognized this integration of modern manufacturing and marketing, selling and shipping operations in holding that "the activity of the sales agents is economically necessary to the production of goods", 142 F. (2d) 438, 441.

Note further that the Second Circuit in its opinion reached the conclusion that "A sales agent who procures the contracts in performance of which the goods are 'transported' is therefore engaged in the production of goods for commerce, since he is 'necessary' to the 'transporting'" and that "Moreover, sales agents may be considered as engaged in 'handling' the goods by arranging their transfer from one person to another." 142 F. (2d) 438, 440-441. As to the first of these reasonings, slightly reoriented it meets the test laid down in *Western Union Tel. Co. v. Lenroot*, for the sales agent's contribution is to "handling" and "working on" the goods, and takes its effect as a "step in putting the subject of commerce in a state to enter commerce", prior to delivery to the carrier at the out-of-state plant. The second recognizes an obviously common meaning of the word "handling" as including "to buy and sell, to deal or trade in" a commodity.⁴⁵

Authorities relied on by petitioner based contrary conclusions upon doctrine of commerce, not production, and inadequate factual showing; the facts here are adequate and the appropriate test less exacting.

9. Petitioner's principal objection to the result reached in the Circuit Court and the principal ground upon which it rested its application for certiorari is an assumed conflict between the decisions of the Second Circuit and the decisions of some six other Circuit Courts of Appeals, together with the Court of Appeals of New York. These, according

⁴⁵ Webster's New International Dictionary (1933) page 978.

to petitioner, "have uniformly held that the work of maintenance employees of multi-tenanted office buildings is not covered by the Act" (Pet. Br., pp. 12-15). The fact is that almost without exception, all of these decisions were based entirely upon the holding that building service employees are not "engaged in commerce" although the tenants in the building serviced are so engaged, following the rationale of this Court in *McLeod v. Threlkeld*, 319 U. S. 491. In the course of the opinion in most of the appellate decisions relied on by petitioner, the court usually made clear that it had to pass upon no contention that the employees were engaged in occupations necessary to production of goods for commerce, nor did the holding reach so far.⁴⁶ In the one or two cases where reference was made to the question of production, the court appears to have not had before it the arguments here set forth and to have further bottomed its decision upon the insubstantial character of the evidence as to the activities of the tenants in question, or the inconsiderable number of tenants renting space as executive offices in connection with manufacturing or mining conducted at plants elsewhere; there was undue reliance also upon a too literal interpretation of the words "close and immediate" in the opinion in *Kirschbaum v. Walling*, substituted as a test for the language of the statute itself.⁴⁷

⁴⁶ *Johnson v. Dallas Downtown Development Co.*, 132 F. (2d) 287 (C. C. A. 5) cert. den. 318 U. S. 790; *Stoike v. First National Bank of N. Y.*, 290 N. Y. 195 (Ct. App. N. Y.) cert. den. 320 U. S. 762; *Tate v. Empire Bldg. Corp.*, 135 F. (2d) 743 (C. C. A. 6) affg., *per curiam*, 2 Wage Hour Cases, 472 (W. D. Tenn.) cert. den. 320 U. S. 766; *Rosenberg v. Semeria, et al.*, 137 F. (2d) 742 (C. C. A. 9) cert. den. 320 U. S. 770; *Convey v. Omaha National Bank*, 140 F. (2d) 640 (C. C. A. 8) cert. den. 321 U. S. 781; *Lofther v. First National Bank*, 138 F. (2d) 299 (C. C. A. 7, 1943).

⁴⁷ *Johnson v. Masonic Bldg. Co.*, 138 F. (2d) 817 (C. C. A. 5) cert. den. 321 U. S. 780; *Rucker v. First National Bank of Miami, Okla.*, 138 F. (2d) 699 (C. C. A. 10) cert. den. 321 U. S. 769. In the *Johnson* case the court remarked that "as the record stands after settlement thereof" there is no evidence that any goods are produced for commerce in the building itself. In the *Rucker* case the court noted that "it is not shown on this record whether any of the goods were produced in the building" and concluded that "under these facts" it could not be said that the maintenance employees were necessary to production.

Petitioner makes similar reliance (Pet. Br., pp. 12, 13, 21, 26, 30).

The shortest answer to petitioner's principal contention is the recent warning to bench and bar in *Armour & Co. v. Wantock*, 323 U. S. 126:

If some of the phrases quoted from previous decisions describe a higher degree of essentiality than these respondents can show, it must be observed that they were all uttered in cases in which the employees were held to be within the Act. A holding that a process or occupation described as "indispensable" or "vital" is one "necessary" within the Act cannot be read as an authority that all which cannot be so described are out of it. *McLeod v. Threlkeld*, 319 U. S. 491, which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged "in commerce", and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce.

Reference to the employees' activities in *Kirschbaum v. Walling* as so closely tied to production as to be "an essential part of it" states the standard in more exacting terms than the word "necessary" here requires.

The trial court having found respondents' duties were performed to enable the various tenants to conduct their activities conveniently and efficiently and that the tenants regularly had use of the facilities provided and derived the intended benefit, respondents were clearly necessary to production of goods for commerce by the tenants.

10. A substantial number of tenants at 10 East 40th Street being thus constantly engaged in the "production of goods for commerce" within the meaning of the Act, the elevator operators, porters, watchmen, mechanics and other

building maintenance and service employees operating the cars taking them to and from work every day, keeping habitable the quarters where they carried on their daily activities, preserving their property from fire and theft, providing the essential light and heat and maintaining the premises in a decent state of repair likewise came within the Act's scope. *Kirschbaum v. Walling*, 316 U. S. 517; *Walton v. Southern Package Corp.*, 320 U. S. 540; *Armour & Co. v. Wantock*, 323 U. S. 126. Not only were the duties performed and facilities served by such employees useful adjuncts of the work of the tenants performed, as found by the trial court, to enable them "to conduct their activities conveniently and efficiently", but such services were indispensable in the sense that tenants could not carry on their businesses in a 48-story building without them.⁴⁸ Nor does the fact that respondents were employed by the building owner and not by any of the tenants, in which the facts here differ from the *Borden* case, insulate them from the protection of the Act (compare Pet. Br., p. 4). *Kirschbaum v. Walling*, 316 U. S. 517; *Walling v. Sondock*, 132 F. (2d) 77 (C. C. A. 5, 1942), cert. den. 318 U. S. 772.

II.

Respondents were engaged in interstate commerce within the meaning of the Act.

We understand it to be undisputed by petitioner that a substantial number of tenants, occupying a substantial portion of the rentable area of the 10 East 40th Street

⁴⁸ It has been stipulated that in all of these activities the tenants have "regularly and continuously had the benefit of and made use of the facilities" supplied by the building service employees (PL Ex. 1, pars. 6-7; R. 308-309). And the trial court found that "the labor of defendant's building service employees has been performed * * * to enable the various tenants to conduct their activities conveniently and efficiently" and the various tenants "regularly and continuously had use of and derived the intended benefit from the various facilities so provided (finding 11, R. 317).

building, was there regularly and continuously engaged in business activities constituting interstate commerce within the Act's definition in Section 3 (b).⁴⁹ In this category would come, in addition to the manufacturing, mining, publishing, advertising and publicity concerns and the sales agents, whose work has been discussed at length above, those tenants in the export and import, construction and engineering, financial and related businesses, and the United States Government. Not without deference for the weight of authority among lower and intermediate courts which reject the argument, we nevertheless urge that the activities of respondents here were so closely related to commerce as conducted in the building by the various tenants as to be deemed an essential part thereof and to bring these employees within the Act's coverage.

We urge further that the very activities above outlined which constitute "production for commerce" as performed by the various tenants in the 10 East 40th Street building, also point to the conclusion that the building is virtually a composite instrumentality of interstate commerce. The work of respondents has been found by the trial court to have been "performed . . . to enable the various tenants to conduct their activities conveniently and efficiently" and the tenants "regularly and continuously had use of and derived the intended benefit from the various facilities so provided" (finding 11, R. 317). It follows that respondents, in protecting the building from fire, theft and other damage, keeping it clean, and providing heat and other necessary comforts, were so closely related to maintenance and operation of an essential instru-

⁴⁹ In any event, this fact would appear to be established by stipulation of the parties (Pl. Ex. 1, par. 9; R. 309). And see *Electric Bond & Share Co. v. S. E. C.*, 303 U. S. 419; *International Text-Book Co. v. Pigg*, 217 U. S. 91, 106-107. See also *Cudahy Packing Co. v. Bazanov*, 245 Ala. 43, 15 So. (2d) 720 (Sup. Ct. Ala. 1943); *McMillan v. Wilson & Co.*, 212 Minn. 142, 2 N. W. (2d) 838 (Sup. Ct. Minn. 1942); *Horton v. Wilson & Co.*, 223 N. C. 71, 23 S. E. (2d) 437 (Sup. Ct. N. C. 1943); *Fleming v. Jacksonville Paper Co.*, 128 F. (2d) 395, 398 (C. C. A. 5, 1942), aff'd. 317 U. S. 564.

ment of commerce as to be deemed a part of such commerce as conducted in the building and to entitle them to the benefits of the Act. *Overstreet v. North Shore Development Co.*, 318 U. S. 125 (1943); *Slover v. Wathen*, 140 F. (2d) 258 (C. C. A. 4, 1944). Each case must be determined upon its own facts. See *Burton v. Zimmerman*, 131 F. (2d) 377 (C. C. A. 4, 1942).

There must be considered finally the fact that certain of the tenants used the building facilities, such as the freight elevators, to acquire goods from out-of-state sources or to ship such goods out across state lines.²⁰ As the Third Circuit observed in *Fleming v. A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3, 1941), elevator operators under such circumstances "are also directly engaged in commerce, for although their activities take place entirely within the state, they carry out one step in the actual transportation of the goods to points outside the State." In affirming this decision, this Court agreed that the building elevators "start and finish the interstate journeys of goods going from and coming to the tenants." *Kirschbaum v. Walling*, 316 U. S. 517, 519. See also *Walling v. Sondock*, 132 F. (2d) 77 (C. C. A. 5, 1942) cert. den. 318 U. S. 772; *Fleming v. Jacksonville Paper Co.*, 128 F. (2d) 395, 398 (C. C. A. 5, 1942), aff'd 317 U. S. 564; *Fleming v. American Stores Co.*, 42 F. Supp. 514, 524, aff'd 133 F. (2d) 840 (C. C. A. 3, 1943), indicating the same result as to watchmen and other maintenance workers.

Accordingly, respondents, who so served these tenants regularly and continuously (finding 11, R. 317), were engaged not only in "production for commerce" but also in "commerce."

²⁰ See references above, pages 13, 15, 17, 18, 26, 29-33; finding 10 (R. 316).

III.

Respondents' functions here met the test of substantiality.

There remains to be considered the question of whether the work of respondents here met the test of substantiality. If their functions are deemed to be so closely related to "commerce" as conducted by the tenants as to be a part thereof, there is some authority to the effect that no test of substantiality applies. *Schmidt v. Peoples Tel. Co. of Maryville*, 138 F. (2d) 13 (C. C. A. 8, 1943); *North Shore Corp. v. Barnett*, 143 F. (2d) 172 (C. C. A. 5, 1944). In cases involving "production of goods for commerce" on the other hand this Court has suggested a test of substantiality without defining its confines. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 572; *Waltón v. So. Package Corp.*, 320 U. S. 540.

We may start with the observation of the Administrator of the Wage and Hour Division, charged with the Act's enforcement, that:

In view of recent decisions of the courts in employee suits brought by maintenance employees in office and bank buildings, until the courts indicate that the Act applies or until further notice, the Division will take no further enforcement action under the wage and hour provisions of the Fair Labor Standards Act *with respect to maintenance employees in buildings in which less than 20 per cent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce.* [Italics added.]

Release No. P. R.-19, Nov. 19, 1943, 6 Wage Hour Rept. 1121, cited by the Second Circuit in its opinion in this case, 146 F. (2d) 438, 440.

It must be noted from the outset that (1) this statement is not an official interpretation of the Act's application, but merely expresses to the public the Administrator's position with respect to enforcement proceedings against employers; (2) the release includes specific reference to the fact that the test there adopted for enforcement purposes is not to be construed as curtailing in any way the independent right of employees to establish some other test of substantiality in private wage suits maintained under Section 16(b), such as the case at bar; (3) the present case was pending prior to the Administrator's adoption of the 20% rule of thumb (R. 1). In any event the requirements of the 20% test have been met in this case, if it is to be applied, as found by the Circuit Court here. 146 F. (2d) 438, 440.

The test of substantiality is not one "of mathematical precision". [*Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875, 879 (S. D. N. Y. 1943).] The Administrator of the Wage and Hour Division has expressed publicly, since an early date in the Act's enforcement, the opinion that

There is no justification for determining the applicability of the Act to a particular employee on the basis of the percentage of the goods he produces which move in interstate commerce. . . . Thus, if in any workweek an employee produces goods for commerce and also produces goods for local consumption and performs work otherwise outside the coverage of the Act, the employee is entitled to both the wage and hour benefits of the Act for all the time worked during that week. The proportion of the employee's time spent in each type of work is not material. An employee spending any part of a workweek producing goods for commerce will be considered on exactly the same basis as an employee engaged exclusively in producing goods for commerce during the workweek and the total number of hours which the employee works during the work-

week at both types of work must be compensated for in accordance with the minimum wage and maximum hour standards of the Act.

Wage and Hour Division, U. S. Dept. of Labor, Interpretative Bulletin No. 5, par. 9, originally issued Dec. 2, 1938, 1942 Wage Hour Manual, pp. 27-28.

This interpretation involving "contemporaneous construction of a statute by the men charged with responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" is "entitled to great weight". *U. S. v. American Trucking Assns.*, 310 U. S. 534, 549, citing *Norwegian Nitrogen Products Co. v. U. S.*, 288 U. S. 294.

Further, not only were the individual activities of the various tenants substantial here in relation to volume of goods ultimately shipped in commerce both from the building and from out-of-state mines, mills and plants, but a substantial portion of the entire space in the building was occupied by tenants regularly and continuously engaged in "production of goods for commerce." But petitioner would urge that a portion of these activities was not substantial as compared with the entire volume of business in the building (Pet. Br., pp. 5, 13, 28-30).* The fact is that a large number of tenants served by respondents produced goods for commerce in what has been conceded throughout the record to be substantial volume. These tenants were scattered throughout the building.

Nor may we ignore the practical aspect of "skyscraper" building such as that here involved: their extension vertically rather than horizontally enables the valuable realty of congested metropolitan areas to be utilized upon an economically sound basis. The net effect on commerce of shipments of a regular and continuous nature initiated by the activities of the various tenants in this building was

* But see note 30a above and compare references there set forth.

not less than if each tenant occupied a separate building and each of the buildings so occupied were served by these same maintenance workers; the effect in fact is more, for the tenants are here assembled together and the services rendered to them are rendered indiscriminately to *all at the same time*. (See findings 10-11, R. 316-317.)

In cases where, as here, interstate and intrastate activities are indiscriminately commingled and there is no segregation as between such activities, the courts are in virtual agreement that an employee is entitled to the benefits of the Act without a balancing of percentages with mathematical precision between work covered by the Act and work not so covered. Compare *A. H. Phillips, Inc. v. Walling*, No. 608, decided Mar. 26, 1945; *U. S. v. Darby*, 312 U. S. 100, 117, 118; *Baltimore & Ohio R. R. Co. v. I. C. C.*, 221 U. S. 612, 619. And see *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 321, 341 (C. C. A. 8, 1944); *Colbeck v. Dairyland Creamery Co.*, S. D. N. W. S. Wage Hour Rept. 455, 9 Labor Cases par. 62,534 (Sup. Ct. S. D. 1945); *Guess v. Montague*, 140 F. (2d) 500, 504 (C. C. A. 4, 1933); *Walling v. New Orleans Private Patrol Service*, 57 F. Supp. 143 (E. D. La. 1943); *Fleming v. Knox*, 42 F. Supp. 948 (N. D. Ga. 1941); *Walling v. West Kentucky Coal Co.*, 8 Wage Hour Rept. 179, 9 Labor Cases par. 62,621 (W. D. Tenn. 1944); *Holland v. Amoskeag Machine Co.*, 44 F. Supp. 884 (D. N. H. 1943); *Walling v. Fox Detective Agency*, 7 Wage Hour Rept. 552, 8 Labor Cases, par. 62,219 (W. D. Tenn. 1944).

Finally, any necessary test of substantiality would appear to be met here under the authority of the many decisions indicating that application of the Act does not depend upon the percentage or volume of goods moving in commerce to which employee's activities specifically relate. It is sufficient if the record indicates that the flow is not casual, sporadic or utterly inconsequential. See *Walling v. Peoples Packing Co.*, 132 F. (2d) 236, 240 (C. C. A. 10,

1943) cert. den. 318 U. S. 774; *Schmidt v. People Tel. Union*, 138 F. (2d) 13, 15 (C. C. A. 8, 1943); *Davis v. Goodman Lumber Co.*, 133 F. (2d) 52, 53 (C. C. A. 4, 1943); *New Mexico Public Service Co. v. Engel*, 145 F. (2d) 636, 640 (C. C. A. 10, 1944); *Sun Pub. Co. v. Walling*, 140 F. (2d) 445, 448 (C. C. A. 6, 1944) cert. den. 322 U. S. 728; *Crompton v. Baker*, 220 N. C. 52, 165 S. E. (2d) 471 (Sup. Ct. N. C. 1941); *Sykes v. Lochmann*, 156 Kan. 223, 132 Pac. (2d) 620 (Sup. Ct. Kan. 1943).

The volume of business in commerce and production for commerce to which the work of these respondents immediately related was "more than that to which courts would apply the maxim *de minimis*." *N. L. R. B. v. Fainblatt*, 306 U. S. 601, 607; see also *Santa Cruz Packing Co. v. N. L. R. B.*, 303 U. S. 453, 467; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 91; *Fleming v. Jacksonville Paper Co.*, 128 F. (2d) 395, 397-398, affd. 317 U. S. 564, 571-572.

CONCLUSION.

The judgment of the Circuit Court of Appeals for the Second Circuit should be affirmed in all respects.

Respectfully submitted,

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APPENDIX

TABLE I.

Space Occupied by Manufacturing and Mining Companies
in 10 E. 40th St. Building.

Room or Floor	Name	Sq. ft. Occupied	Record Reference
3302	Ames Bag Machine Co.	300	R. 228
3110	Arkell Safety Bag Co.	2,400	R. 183
3100	Beechnut Packing Company ..	2,690	R. 97
1903	Blackinton & Co.	980	R. 193
44th-	Chase Brass & Copper Com- pany	12,155	R. 196
48th	Cherokee Spinning Company ..	770	R. 137
17th	Cluett Peabody & Company ..	6,415	R. 234
1801	Cluett Peabody & Company ..	3,595	
2510	Domestic Concentrates Inc.	200	R. 153
3504	J. H. Dunning Corp.	1,100	R. 161
2205	Eastman Kodak Company	2,500	R. 60, 74, 83
4010	Eastman Kodak Company Thomas A. Edison Co. Inc.	1,950	
710	(Ediphone Division)	2,500	R. 112
2501	(Export Division)	2,300	R. 112, 124
	Forbes Lithograph Mfg. Co.		
2203	(Philadelphia Division)	1,100	R. 18-9, R. 56-7.
3003	(New York Division)	2,260	R. 18-9, R. 56-7,
1907	General Motors Co. (Cleveland Diesel Engine Division)	2,140	R. 61
2105	Perolin Company of New York	1,450	R. 209
2003	Perolin Company of New York	540	R. 209
1401	Standard Magazines, Inc.	5,700	R. 285
3600	Tennessee Eastman Corp.	920	R. 64
2007	United Feldspar Minerals Corp.	980	R. 248
1501	Vanity Fair Mills	6,415	R. 165
2308	S. S. White Dental Mfg. Co. (Industrial Division)	1,510	R. 175
Total Square Feet Occupied			60,570

TABLE II.

Space Occupied by Advertising, Publicity and Trade
Organizations in 10 E. 40th St. Building.

Room or Floor	Name	Sq. ft. Occupied	Record Reference
1904	Allied Liquor Industries	1,500	R. 245
3307	American Investors Union	1,430	R. 261
3705	Business Organizations Inc.	3,570	R. 83
38th	Carl Byoir & Associates	4,735	R. 83
2508	Carl Byoir & Associates	715	R. 83
2905	George E. Hatch	875	R. 103
4310	Textile Economics Bureau	965	R. 292
2701	Textile Research Institute	770	R. 190
4402	Textile Surveys	270	R. 294
4105	Willis L. Towne	475	R. 134
3703	John F. Yewell	215	R. 202
Total Square Feet Occupied			15,520

TABLE II-a.

Space Occupied by Advertising, Publicity and Editorial
Offices of Manufacturers in 10 E. 40th Street Building.

Room or Floor	Name	Sq. ft. Occupied	Record Reference.	Activities Discussed* Resp. Br. page
3110	Arkell Safety Bag Co.	2,400	R. 183	23
1301	Beechnut Packing Company	2,690	R. 97	15-16
17th	Cluett Peabody & Co.	6,415	R. 234	24-26
1801	Cluett Peabody & Co.	3,595	R. 234	24-26
2205	Eastman Kodak Com- pany	2,500	R. 69	14-15
4010	Eastman Kodak Com- pany	1,950	R. 74, 83	14-15
	Forbes Lithograph Mfg. Co.			
3003	(New York Division)	2,260	R. 18-9, R. 56-7.	11-14
2203	(Philadelphia Divi- sion)	1,100	R. 18-9, R. 56-7.	11-14
2105	Perolin Co. of New York	1,450	R. 209	16-17
2003	Perolin Co. of New York	540	R. 209	16-17
1401	Standard Magazines Inc.	5,700	R. 285	27
1501	Vanity Fair Mills	6,415	R. 165	21
Total Square Feet Occupied		37,015		

* Advertising, publicity and editorial activities of this group discussed in full at pages indicated. See record references at such pages above. See also summary of these activities, page 54 of the brief. These activities are among those conducted in offices of manufacturers already included in Table I.

TABLE III.

Space Occupied by Manufacturers' and Mine Sales Agents
in 1Q E. 40th St. Building.

Room or Floor	Name	Sq. ft. Occupied	Record Reference
3207	Birmingham & Prosser Co.	650	R. 252-3
4500	D'Art Craftsmen	100	R. 213-4
4202	E. Kelly Downey	260	R. 108
2310	James Barr & Company	1,010	R. 302
4409	Chemical Marketing Co.	695	R. 301
2408	City Industrial Corp.	890	R. 302
3702	Dusenbury & Dusenbury	215	R. 301
2409	Federal Seaboard Terra-Cotta Corp.	550	R. 301
1608	Kane Import Company	1,030	R. 302
1605	J. E. Langsdorf Co. Inc.	1,400	R. 302
2803	National Products Refining Co.	900	R. 301
3209	New York Textile Plants	1,120	R. 302
3008	Periodical Publishers' Associa- tion	1,850	R. 302
4106	Stanley Fullwood	245	R. 200-1
3406	Stanley Lowen	240	R. 290
2607	Stewart-Allen Company	1,190	R. 230
39th	A. M. Tenney Associates	9,470	R. 116
40th			
Total Square Feet Occupied 21,725			